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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 325

JOSEF ROSENBERG, SAMUEL FREIER and HANS EISLER,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JAMES I. CUFF,
Attorney for Petitioners.

HENRY G. SINGER and
HARRY SILVER,
With him on the brief.

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IN THE

Supreme Court of the United States

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No. .....

JOSEF ROSENBERG, SAMUEL FREIER and HANS EISLER,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Josef Rosenberg, Samuel Freier and Hans Eisler respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in this case, July 17, 1945 (1641).

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C.; Section 347 (a), and under Sections 687, 688, Title 18, U. S. Code, and the Rules of Criminal Procedure adopted thereunder, particularly Rule 11. This petition is filed within thirty days from the date of the judgment, in accordance with the rules.

Opinions Below

In overruling the demurrer of the petitioners to the indictment, Campbell, District Judge, Eastern District of New York, wrote an opinion which is reported at 47 Fed. Supp. 406 (1587-1594).* There was no other opinion in the District Court. The opinion of the Circuit Court of Appeals for the Second Circuit (Swan, Chase and Clark) has not yet been reported. It appears at 1630-1641. The concurring opinion by Clark, *C.J.* is at 1641.

Statement of Matter Involved

The judgment of the Circuit Court of Appeals sought to be reviewed, affirmed a judgment convicting the petitioners and others, under Title 18, Section 88, of conspiring to violate Section 6 of Chapter 508 of the Act of July 2, 1940, 54 Stat. 714, 50 U. S. C. Appendix, Section 701, which statute authorized the President by proclamation to prohibit or curtail the exportation of certain materials, except under such rules and regulations as he shall prescribe.

The indictment, in substance, charged that petitioners and others, between February 1st, 1941 and April 14th,

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* All references are to pages of the Record.

1942* conspired to violate the provisions of the aforesaid statute. It further charged that, in violation of Presidential proclamation (No. 2413, July 2nd, 1940) platinum was exported from the United States to Portugal "through the medium of crew members employed on various vessels or steamships", and by means of "crew members employed on the Pan American Clipper" (13), both vessels and planes plying between the United States and Portugal.

Questions Presented

1. Did the Circuit Court err in holding (a) that the statute involved foreign affairs and therefore the delegation of legislative power to the President was legal, and (b) that the statute merely left "the time and detail of its execution" to the President, and was therefore constitutional?

2. Did the Circuit Court err in rejecting the contention of the petitioners that the proclamation of the President was null and void, in that it did not comply with the condition annexed by Congress to its grant of authority, to wit, the setting up and publicizing by the President of objective specifications whereby uniform administration would be provided?

3. Did the Circuit Court err in holding that the prosecution of the petitioners after June 30, 1942 was permissible, even though the statute itself was a temporary one and terminated by its own provisions on the aforesaid date?

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* The Trial Judge held that the conspiracy ended on July 10th, 1941 (144-145).

4. Did the Circuit Court err in holding that the petitioners received a fair and impartial trial, especially in view of the Court's rulings and charge on the effect of evidence of crime in which the petitioners were not involved?

5. Did the Circuit Court err in holding that the evidence was sufficient to warrant the submission of the case to the Jury, as to the petitioner Eisler.

Reasons for Allowance of the Writ

1. The decision herein upholding the constitutionality of the statute in question appears to be in conflict with the decisions of this Court in *Field* v. *Clark*, 143 U. S. 649; *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

2. The decision herein apparently misinterprets the opinion of this Court in *U. S.* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304.

3. The constitutionality of this statute has not been reviewed by this Court.

4. The question whether the Presidential proclamation complied with the conditions of the Congressional grant of power is an important question of Federal Administrative Law, which has not been, but should be settled by this Court. If the condition of the grant of power to proclaim prohibition or curtailment or exportation was not complied with, the decision herein is in conflict with the decisions of this Court in *Mahler* v. *Eby*, 264 U. S. 32, 44, and *Wichita*

R. R. & Light Co. v. *Public Service Commission*, 260 U. S. 48, 59.

5. This Court has never passed upon the question of whether prosecution may be maintained subsequent to the date of expiration of a temporary statute, since the enactment of Title 1 U. S. C. 29. The ruling of the Circuit Court in this case seems to be directly in conflict with this Court's holding in *The Irresistible*, 20 U. S. 551.

6. The rulings and instructions of the Trial Court departed from the basic concepts of justice that a man may not be convicted on proof of crimes committed by others.

7. The ruling of the Circuit Court on the question of joinder of offenses seems to be directly in conflict with this Court's holding in *McElroy* v. *U. S.*, 164 U. S. 76. On this same question, there is also a variance between the holding of the Second Circuit and that of the Eighth Circuit in *Coco* v. *U. S.*, 289 Fed. 33, which ought to be resolved by this Court.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the proceedings of said Court herein, being the case numbered and entitled in its docket as "United States of America, Appellee, v. Josef Rosenberg, Samuel Freier, etc., Defendants-Appellants," and that the judg-

ment of said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated, August 15, 1945.

JOSEF ROSENBERG
Petitioner

SAMUEL FREIER
Petitioner

HANS EISLER
Petitioner

By JAMES I. CUFF,
Attorney for Petitioners.

HENRY G. SINGER, and
HARRY SILVER,
With him on the Petition.

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated, August 15, 1945.

JAMES I. CUFF,
Attorney for Petitioners and a member of the Bar of this Court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

JOSEF ROSENBERG and SAMUEL FREIER,

Petitioners,

—against—

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Statutes Involved

The Federal statutes involved are Title 50 U. S. C. Appendix 701 and the amendments thereto (Act of July 2nd, 1940, Chapter 508, Sec. 6, 54 Stat. 714; Act of June 30, 1942, Chapter 461, Sec. 6, 56 Stat. 463); Title 18 U. S. C. 88; Title I Section 29 prior to its amendment on March 22, 1944 (58 Stat. 118).

Statement of Facts

The Indictment

The substance of the indictment has been set forth under "Statement of Matter Involved", *supra.* It is printed in the record at pages 11, 22.

The Evidence

Testimony adduced on behalf of the Government placed the petitioners Rosenberg and Freier, co-conspirators Hersh Neumann and Abe Neumann and Arnold Weisz (none of whom were under indictment herein), and Koppel (co-defendant who pleaded guilty), all in the roles of partners in the series of three shipments of platinum to Lisbon, Portugal, by steamboat, in the custody of members of the crew (43, 52, 53, 70, 83, 92, 115). These shipments were made in March, April and May of 1941. Later in May, a fourth shipment was made in like manner, but Arnold Weisz was not included in the partnership, although petitioner Freier later sold his interest therein to him (120, 522).

Following the first shipment, these partners decided to make a shipment of platinum, to take advantage of the higher price obtainable for platinum in Canada (56, 790). Irene Weisz, a sister of Arnold Weisz, took platinum purchased with funds contributed by the six partners, to her brother, Ernest Weiss who, himself, carried the platinum to Canada, but at the last moment failed to dispose of the platinum, lest he be exposed, and returned the precious metal to New York (495, 794 and 70). This platinum became part of a subsequent shipment by steamboat to Portugal.

Arnold Weisz, in May, 1941, embarked on a private platinum exportation venture of his own, the shipment of platinum by Transatlantic Clipper. There was no evidence that Arnold Weisz' partners in the steamboat shipments had any knowledge of his exportation of platinum by Clipper (166-170). It appears that Arnold Weisz had no partners in his enterprise of air transport of platinum, but himself financed the transactions. Arnold Weisz employed

a set of co-conspirators who played no part in the partnership ventures, namely, one Felsenberg (964) to purchase platinum for him, and Flight Stewards Mezenen (969) and Mario (971-2) to transport the platinum. The petitioners at the trial steadfastly denied their guilt.

A statement of the testimony relating to petitioner Eisler appears under V, *infra*.

ARGUMENT

I

The statute upon which the indictment is based represents an unconstitutional delegation of legislative power.

Section 6 of the Act of July 2nd, 1940, empowered, but did not require, the President to prohibit or curtail exportation of military articles, etc., "whenever [he] determines it is necessary". The statute and the offense must be considered in the light of the Court's ruling that the alleged conspiracy ended July 10th, 1941 (144-145), five months before the declaration of war.

It is our position that a grant of power to the Executive by the Legislature, to qualify for constitutionality, must require and direct the Executive to maintain a given course of action, if not absolutely, at least upon specified contingency, determined under standards formulated by Congress. The Executive's finding that such requisite condition or state of affairs exist may by appropriate legislative mandate constitute the contingency requisite to activate the enactment. The making of the finding may be left to the discretion of the executive, but residual uncontrolled option to activate a statute or to leave it inoperative, may not constitutionally be delegated.

Under Section 6 of the statute here involved, there were no declared legislative circumstances under which the President was required to prohibit or curtail any exports. He was permitted to fix the policy and the standard. He was merely contingently authorized to act. He was not directed or required to do anything. Under existing authority (*Field* v. *Clark*, 143 U. S. 649, 693;* *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 415; and *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 541), the failure to compel action under stated circumstances rendered the delegation of power legislative, and hence unconstitutional.

The full Circuit Court held that "the delegation of authority may be upheld on * * * the ground * * * of the traditional dominance of the Executive in the conduct of foreign affairs" relying on *U. S.* v. *Curtiss-Wright Export Corporation*, 299 U. S. 304, 322 as authority. Judges Swan and Clark further upheld the constitutionality of the delegation of power upon the theory that the statute defined the policy, but left "the time and detail of its execution" to the President. Judge Chase did not join in the second ground (1632).

We urge that both grounds are untenable.

A

The statute herein is not an enactment in the field of foreign affairs within the meaning of the term in the law of delegation of legislative power.

The line of demarkation between external affairs and internal affairs was clearly drawn by this Court in the course of its opinion in *United States* v. *Curtiss-Wright*

* The Act construed in *Field* v. *Clark* stated "he [the President] shall have the power and *it shall be his duty* * * *" page 680 of 143 U. S. (emphasis ours).

Export Corp., 299 U. S. 304. At page 319, this Court stated, "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. On the basis of this definition the Court noted further (pages 319, 320) "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations • • •."

The regulation of foreign commerce is a duty, power and function which the Constitution expressly confers upon Congress (Article 1, Section 8; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492). Thus, it can hardly be urged that regulation of foreign commerce such as control of exports is intrinsically a field in which "the President alone has the power to speak or listen as a representative of the nation."

Under the Joint Resolution of Congress, considered in the *Curtiss-Wright* case (48 Stat. 811), the President was required to consult and to cooperate with the Governments of American Republics,—to speak and listen as a representative of this nation—thereby providing a situation which combined authority delegated to the President by Congress, with the President's own independent and coordinate authority. Manifestly, it is the consultation and cooperation of the Executive with other nations which constitutes foreign relations, and not control of exportation which was merely the subject matter of the agreement of the consultation and cooperation, just as an infinite number of other matters might be the subject of such foreign relations.

When delegation of power to control exports, or indeed, imports, as in *Field* v. *Clark*, 143 U. S. 649, is referred to as constituting foreign affairs, it is not because such control is itself in the realm of international relations, but because there is involved in the statute delegating power the clear intention that specified reciprocity with foreign governments is the object in view. The entire concept in this class of cases is that the delegation of power to the President by both Houses of Congress, taken together with the Presidential action thereunder, serves as a substitute for what might otherwise be the subject of Presidential agreement with foreign nations, with or without the concurrence of the Senate. See McDougal and Lands, Treaties and Congressional—Executive or Presidential Agreement Interchangeable Instruments of National Policy, 54 Yale L. J. 181, 244-255, cited in the opinion of the Circuit Court at page 1633.

In our case there was no aspect of consultation, cooperation or agreement enjoined upon the President. There was merely unilateral control of exportation.

It may well be that Congress may carve out a specified area of legislation in domestic affairs, including that of specified regulation of foreign commerce and authorize the President to make designated adjustments and modifications in the law, as a matter of national policy in dealings with foreign nations. Once specified items of domestic affairs are thus entrusted to Presidential utilization for negotiation with foreign countries, it may well be that a certain range of discretion must necessarily be delegated to the President, and the entire matter left in terms of such discretion rather than of adamant obligation.

However, before it may be urged that a matter intrinsically domestic is thus entitled to status as an expedient in the field of foreign affairs, the least required to be shown,

is a forthright declaration by Congress that it is making the requisite transfer and conversion of its legislative power into an adjunct of diplomacy.

The language of the joint resolution in *U. S.* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, *supra*, as above noted, contains this forthright offering to the President of prohibition of exportation of designated products to a designated foreign area, for utilization in foreign affairs.

In our case there is no corresponding statement of purpose or intent, and the most that can be gathered from the text of Section 6 and the Title of the Act ("An Act to expedite the strengthening of the National Defense") is that it is legislation exclusively in the field of the conservation of military resources.

"National defense" includes all matters directly and reasonably connected with the defense of the nation against its enemies. *Gorin* v. *United States*, 312 U. S. 19, 28-30.

The defense of the United States, the power to declare war, to raise and support armies, to provide a Navy, and to provide for the "common defense" and the general welfare are powers *expressly* given to the Congress under Article 1, Section 8 of the Constitution.

That Congress has exclusive power to enact legislation in aid of the "national defense" cannot be questioned. "The common defense was one of the purposes for which the people ordained and established the constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy * * *." (*United States* v. *Schwimmer*, 279 U. S. 644, 650.)

The fact that the United States is but one nation in a world composed of many nations, necessarily impinges upon and influences our domestic legislation, including, of course, national defense. This, however, does not convert all of our domestic affairs wholesale into foreign affairs.

Military legislation is particularly influenced by worldwide conditions. Nevertheless, it has never been held, nor has anyone even claimed that the regulation of our Army and Navy are matters of external affairs within the contemplation of the theory of the delegation of legislative power.

Since National Defense is intrinsically a domestic concern within the enumerated powers of Congress, reference to it does not bridge the gap between domestic and foreign affairs, nor, accomplish the act of conversion and transfer required before regulation of foreign commerce can be deemed to have been changed into a foreign affair. Thus, the Act remains as an un-constitutional delegation of legislative power over a domestic affair.

Since the statute in our case does not compel Presidential action, under standards formulated by Congress, it falls short of the standard required in *Buttfield* v. *Stranahan*, 192 U. S. 470, and *Hampton* v. *U. S.*, 276 U. S. 394.

B

The statute herein did not merely lodge with the president "the time and detail of execution" but invested him with plenary authority to decide whether under any circumstances exportation would be prohibited or curtailed.

The difference between mere grant of authority in a delegation of power on the one hand, and the imposition of duty and direction is too broad and well marked in the decisions, for the enactment herein to be properly characterized as bestowing on the President only the right to choose "the time and detail of its execution." The entire rationale of the opinion in the *Curtiss-Wright* case and that of *Field* v. *Clark* would be meaningless and incoherent, were the grant of authority to be deemed synonymous with

the imposition of duty and direction. Certainly there is no suggestion in the *Curtiss-Wright* opinion that the authorization vested in the President by the statute therein left only time and detail of execution to the President. On the contrary, the discretion and option permitted the President in statutes merely authorizing his action is well recognized, and the entire discussion of the case pivots on that fact.

The cases cited by the Circuit Court in support of the text that only the time and detail of execution were left to the executive do not bear out the Court's point. Thus the Court cites *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 216. In the statute under review in that case, however, the Commission was directed to act. Such action was not merely permissive. (See pp. 214, 215, of 319 U. S.) In *United States* v. *Von Clemm,* 136 F. (2d) 968, 970, the Presidential order was sustained on the ground that a subsequent Act of Congress had confirmed and approved that order. *Hirabayashi* v. *U. S.,* 320 U. S. 81, is distinctly war legislation.

II

The presidential proclamation (No. 2413) of prohibition of exportation under Section 6, did not comply with the conditions annexed by Congress to the authorization of such proclamation, and hence, the proclamation is invalid.

A

Section 6 provided that the presidential proclamation to control exportations should set up rules and regulations. The creation of such rules and regulations were a necessary condition attached by Congress to the grant of power.

"Rules and regulations in a legal sense means laws." (*Higby* v. *Higby*, 4 Utah 19, 26; 5 P. 693, 694). Indeed, the language "rules and regulations" appear in the Constitution (Article 4, Section 3).

In *State Racing Commission* v. *Latonia Agricultural Association*, 136 Ky. 173, 123 S. W. 681, the Court defines "rules and regulations" (p. 187) and distinguishes between statutes which provide for the setting up of rules and regulations and those which omit the requirement permitting action under the general purposes of the Act (pp. 190-191). As the Kentucky Court said at page 187, *supra*:

> "'Rules and regulations' as the term is employed in the statute, implies uniformity, publicity, and the establishment of standards by which applicants or licensees may know in advance upon what conditions the license may be granted, or will be withheld or revoked. The outline suggested is not because of the discretion vested in the board, but because the statute requires that there be rules and regulations."

Without waiver of the claims made under I herein, we earnestly contend that the alleged rules and regulations set up by the president were not, in law or fact, sufficient to meet the legal requirements. Although the presidential proclamation purports to subject the entire subject of the control of these exports to rule and regulation, recourse to the proclamation itself establishes the contrary.

At Volume 5, Federal Register (1940) page 2468, the proclamation states:

> "And I do hereby empower the Secretary of State to issue licenses authorizing the exportation of any of the said articles and materials the exportation of which is not already subjected to the requirement that

> a license be obtained from the Secretary of State authorizing their exportation *and I do hereby authorize and enjoin him to issue or refuse to issue licenses authorizing the exportation of any of the articles or materials listed above in accordance with the aforesaid rules and regulations* or such specific directives as may be from time to time, communicated to him by the Administrator of Export Control." (Emphasis supplied.)

However, when we examine the so-called rules and regulations, we find that they fail to come up to the standard laid down in the existing cases, in that there is no provision for uniform standards by which an application may be appraised by the Secretary of State, and by which an applicant or the public generally might know the objective conditions upon which an application would be granted or denied. The purported "regulations" as they appear in the Federal Register, Volume 5, page 2469, prescribe only forms for applications (Sections 1 and 2) and we search in vain for substantive specifications which the Secretary of State is to consult and by the terms of which he is to appraise an application. We find only this (p. 2469 Federal Register Vol. 5—1940).

> "3. The Secretary of State will issue export licenses to authorize proposed shipments of said articles and materials to applicants who have duly filled out the appropriate form when I have determined that the proposed exportation would not be detrimental to the interests of the national defense."

The statutory provision that the officer to whom power is delegated, shall prescribe rules and regulations for his actions, sets up a requirement of more than mere exercise

of discretion under the general purposes of the Act, in order to validate the action of the executive officer. In this case rules and regulations in the cited text attempt to rise above their source, and arbitrarily state that the exercise of discretion within the general purpose of the Act shall itself, be the requisite rule and regulation. This, of course, is untenable. If a distinction between action pursuant to rule and regulation, and action subject only to discretion under the general purposes of law in fact does exist, such distinction cannot be obliterated by administrative fiat. (*State Racing Commission* v. *Latonia Agricultural Association*, 136 Ky. 173, 123 S. W. 681, *supra.*)

United States v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, is an example of the type of delegation of power by legislative grant in which no requirement that executive decision be exercised pursuant to rule and regulation was imposed by Congress. The joint Resolution empowered the President to make "limitations and exceptions" (p. 312) to his order of prohibition. Hence, the issuance or non-issuance of licenses was not subject to appraisal under criteria set up by rule and regulation.

Indeed, generally in cases in which the President has been empowered to embargo or to lift existing enacted embargoes or otherwise to regulate exportation as an expedient of diplomacy (see abstracts of such legislation, in *Curtiss-Wright* opinion), decision pursuant to rule and regulation is not enjoined upon the President. The criteria explicitly set up is generally put broadly, as in the nature of specified reciprocity by our government to specified action or conduct on the part of a foreign government, without further qualification that rules and regulations be set up to govern Presidential action.

On June 30, 1942, the Chief, Export Control Branch, Office of Exports, of the Board of Economic Warfare, pursuant to sub-delegation of powers to him (in accordance

with the provisions of section 6(c) of the Act of June 30, 1942, Chap. 461, 56 Stat. 463), issued rules and regulations relating to control of Exportation. These rules and regulations cover pages 4952 to 5019 of the July 2, 1942 issue of the Federal Register.

These comprehensive rules and regulations go a long way toward supplying the hitherto missing elements of publicity, uniformity and advance knowledge of specifications, in the administration of export control, which are necessary to qualify such administration as being subject to rule and regulation.

The new rules and regulations highlight the failings of the old and demonstrate that the administration of export control had not been hitherto subject to rule and regulation in the accepted and general meaning of this familiar phrase, but had represented uncontrolled judgment of minor administrative officials in the exercise of their discretion under the general purposes of the statute.

There is set up in the new regulation a pattern of division into classifications of the articles and merchandise which require licenses for exportation and corresponding division into classifications of country of consignment. The public is informed that certain licenses are obtainable as a matter of course. Certain classifications of articles and merchandise are rendered exportable to designated classification of places of destination, by general license which is issued to the public without application. Other groupings of articles are exportable under general license provided a shipment does not exceed specified maximum values.

For example, the public is put on notice that application for licenses to export specified merchandise to Portugal will not be considered unless appropriate authorities in London have issued a blockade control permit (p. 5015, [sec. 805.5] Fed. Reg. July 2, 1942).

It is not suggested that the classifications of articles, value, and countries of destination made in the rules and regulations of the Board of Economic Warfare on June 30, 1942, when the country was at war, would be logical, in July 1940. The point urged, however, is that administration of export control in July 1940, if not entirely haphazard and chaotic, which condition is certainly not to be presumed, necessarily required administrative officials to devise a plan and scheme of classifications of exportable merchandise, by kind and value of shipment, and possibly by place of destination. These classifications must have existed *off the record*. The statute, fairly read, it is urged, required that they be given official publicity, thereby facilitating regularity and uniformity in treatment of applications, and rendering favoritism or discrimination among applicants readily susceptible to detection and exposure. To require control subject to rule and regulation is tantamount to requiring the setting of uniform standards of control. (See *Butfield* v. *Stranahan*, 192 U. S. 470, *supra; In Re Kollock*, 165 U. S. 526.)

This Court very recently had occasion to hold that administrative rule and regulation promulgated pursuant to law might not be disregarded by the agency whose procedure and function they were designed to govern. (*Bridges* v. *Wixon*, decided June 18, 1945, Law. Ed. Vol. 89, page 1489, at 1498.)

This recognition of the authoritative status of administrative rule and regulation promulgated pursuant to statute, underscores the essentiality of executive observance of the legislative mandate that rules and regulations, at the outset, be prescribed by an administrative office for its own guidance and control. Certainly, the administrative agency could not disregard the legislative mandate and entirely omit setting up the requisite rules and regulations. By a parity of reasoning, it is submitted, the administrative

agency may not set up matter which is denominated as "rules and regulations" but which fall definitely short of fulfilling the function of rules and regulation, or of qualifying as such as a matter of definition, by failing to set up reasonable specifications designed to assure regularity, uniformity and publicity.

B

It is well settled law that the violation of a legislative order of an executive officer can be punished as a crime only if the order complies with the requirements, conditions and qualifications attached to the grant of the delegation of power.

In *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 432, this Court said: "If the citizen is to be punished for the crime of violating a legislative order of an executive officer or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission." Again in *Mahler* v. *Eby,* 264 U. S. 32, 44, the Court states: "It is essential that, where an executive is exercising delegated legislative power, he should substantially comply with all the statutory requirements in its exercise and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act."

In the cited case the Court quotes from its decision in *Wichita R. R. & Light Co.* v. *Public Service Commission,* 260 U. S. 48, 59, including the following: "It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action."

In our case, we respectfully submit that the Presidential order failed to comply with the Congressional condition and qualification that prohibition of exportation be subjected to

rule and regulation, and hence, is invalid under the rule of the cases cited.

III

The prosecution of petitioners after June 30, 1942 (the expiration or repeal of the temporary statute) was barred, and their conviction must be reversed.

The Act of July 2, 1940, was a temporary statute. By its terms, it expired on June 30, 1942, unless Congress "shall otherwise provide." At common law, prosecutions for violation of a temporary statute could not be maintained subsequent to its expiration. (*The Irresistible,* 20 U. S. 551.)

Petitioners urge that no change was made by statute permitting prosecution after the expiration of a temporary statute until the recent amendment of Title 1, U. S. C., Sec. 29, on March 29, 1944, almost eighteen months after this conviction was had. Certainly this amendment was not retroactive and could have no legal effect to validate that which was invalid. Thus, the trial of the petitioners in September and October of 1942 was illegal, and their conviction cannot be permitted to stand. In connection with the amendment of March 22, 1944, Title 1, U. S. C., Sec. 29, the Court's attention is respectfully referred to Senate Committee Report No. 734, 78th Congress, and the letter of the Attorney General dated July 24, 1942. In this letter the Attorney General recognizes that the then existing statute, Title 1 U. S. C., Sec. 29 did not apply to temporary statutes.

The Circuit Court, however, held that the Act of July 2, 1940, did not expire on June 30, 1942, but by virtue of the Act of June 30, 1942 (Chapter 461, 56 Stat. 463) was extended to June 30, 1944, and that it was therefore unnecessary to consider whether Title 1 U. S. C. Sec. 29 prior to

its aforesaid amendment constituted a savings clause authorizing prosecutions subsequent to the expiration of a temporary statute. (See footnote, p. 1634, C. C. A. opinion.)

Under familiar principles of statutory construction, we contend that the Act of June 30, 1942, is a new and different statute, and that by virtue of its enactment, the earlier Act (July 2, 1940) either expired on June 30, 1942, or was repealed as of that day. The points of contrast between the old and the new statute are so numerous and vital that a mere scheduling of the differences serves to refute the Circuit Court's statement that the new is an extension of the old.

(a) 1940 Act: Enacted while we were at peace, and the preamble defines its purpose as being to expedite the national defense.

1942 Act: Enacted while this country was at war. By its title, its purpose was to further expedite the prosecution of the war.

(b) 1940 Act: Its application was limited to such war equipment or component parts thereof, machinery and tools, as the President might determine it was necessary to the national defense to prohibit or curtail the exportation thereof.

1942 Act: It embraced any and all articles, materials and technical data without regard to their character, destination or relation to the war effort or national defense.

(c) 1940 Act: It required the President to find as a fact that the prohibition of exportation of the listed articles was necessary to national defense.

1942 Act: It required no finding as a condition precedent to the exercise of the power.

(d) 1940 Act: Authority expired on June 30, 1942, unless Congress otherwise provided.

1942 Act: The President's authority is to terminate on June 30, 1944, or upon prior date that Congress or the President might designate.

(e) 1940 Act: Contained no saving clause as to the prosecutions not commenced prior to the date of expiration.

1942 Act: Contains such a saving clause.

In the 1942 statute immediately following the enactment clause, the language appears "That Section 6 of the Act of July 2, 1940 (54 Stat. 714) is hereby amended to read as follows". This language operates to repeal the prior statute. When a statute recites that another "is amended to read as follows", the former is necessarily repealed. (*Roman* v. *Ide,* 107 F. 161, Cert. denied 181 U. S. 619; *Columbia Wire Co.* v. *Boyce,* 104 F. 172; *Heinze* v. *Butte & B. Consol. Min. Co.,* 107 F. 165, Cert. denied 194 U. S. 632.)

Thus, whether it be deemed that the 1940 Act was repealed or whether it expired on June 30, 1942, makes no difference in the result as far as the prosecution of these petitioners after June 30, 1942, is concerned. Our authority for this statement is this Court's reasoning in *The Irresistible,* 20 U. S. 551, and the fact that the savings clause mentioned in cited case is substantially the same as that in the amendment to Title 1, U. S. C. Sec. 29, insofar as the latter's effect on the temporary statute is concerned.

In *The Irresistible,* 20 U. S. 551, a temporary statute was repealed prior to the date of its expiration, and new provisions on the same subject adopted, the new statute providing "that persons having offended against any of the Acts aforesaid may be prosecuted, convicted and punished as if the same were not repealed." This Court held that "the obvious

construction of this clause is, that the power to prosecute, convict and punish offenders against either of the repealed Acts remains as if the repealing Act had never been passed", and the Court went on further to say that "it is well settled, that an offense against a temporary Act cannot be punished after the expiration of the act, unless a particular provision be made by law for that purpose". (*The Irresistible,* 20 U. S. 551, 552.)

No such provision appears in the statute of July 2, 1940. Only in the new statute of June 30, 1942, was there a provision extending the right to prosecute beyond the expiration date.

Returning then to Title 1, U. S. C. Sec. 29, prior to its amendment, we must insist that it be interpreted as this Court interpreted the savings clause in *The Irresistible* case, namely, to leave the matter of prosecution of a temporary statute in status quo, which in our case was the original date of the expiration of the temporary statute —June 30, 1942—as the last day for the maintenance of any prosecution for violation thereof. It follows, therefore, that since these petitioners were not brought to trial until September, 1942, their conviction was illegal.

IV

Petitioners were denied a fair trial because of the Trial Court's ruling having the effect of permitting the jury to consider proof of crimes committed by others as proof of petitioners' guilt under this indictment. The opinion of the Circuit Court overrules this Court's decision in *McElroy* v. *United States,* 164 U. S. 76, 81.

The Circuit Court has misappraised the gravamen of our complaint on this score, as an objection relating to variance. Actually, the disparity between the single conspiracy al-

leged in the indictment and the two conspiracies of which testimony was given, merely precipitated the prejudicial rulings and instructions which intolerably disfigured the lineaments of a fair trial herein.

This Court's decision in *Berger* v. *United States,* 295 U. S. 78, stands as authority for the proposition that the evidence in our case really showed two separate conspiracies with no connection except a common member to both schemes. See also the same case in the Circuit Court of Appeals 73 F. 2d 278; *Tinsley* v. *United States,* 43 F. 2d 890; *Marcante* v. *United States,* 49 F. 2d 156; *Terry* v. *United States,* 7 F. 2d 28; *Wyatt* v. *United States,* 23 F. 2d 791.

A

This Court has held, in *McElroy* v. *United States* (164 U. S. 76, 81), that several counts involving crimes of the same nature might be joined in the same indictment, but that, however, "joinder cannot be sustained where the parties are not the same and the offenses are in no wise parts of the same transaction and must depend upon evidence of a different set of facts as to each or some of them". (164 U. S., at page 81.) The Circuit Court in our case has held (1637) "Just as in the *Cohen* case [*U. S.* v. *Cohen,* 125 Fed. 2d 82, Cert. denied 323 U. S. 799] all the transactions are crimes of the same kind and could have been joined and pleaded in separate counts, even though the confederates were not the same in all". There is no authority stated for this theory except that created by the 2nd Circuit itself in the cases cited in its own opinion, and *United States* v. *Tuffanelli* (7 C. 131 Fed. 2d 890, 893, 894; Cert. denied 318 U. S. 772). In the *Tuffanelli* case the majority of the Court conceded that such joinder on the part of the prosecuting official was bad practice, but that under the particular circum-

stances of that case they would affirm the judgment of conviction. Whether the latter reason motivated this Court in denying the petition for certiorari, the writer does not know. However, research on the subject discloses no authority in this Court changing or modifying its ruling in the *McElroy* case, *supra*. The Tenth Circuit in *Marcante* v. *U. S.*, 49 Fed. 2d 156; the Ninth Circuit in *Terry* v. *U. S.*, 7 Fed. 2d 28, 30, and the Eighth Circuit in *Coco* v. *U. S.*, 289 Fed. 33, follow this Court's ruling in the *McElroy* case. Thus, it is crystal clear that there is a variance between the Circuits on a basic principal in the administration of criminal law in the Federal Courts. As a matter of fact, the new rules of criminal procedure for the District Courts of the United States cement the principle stated in the *McElroy* case. Under Rule 13 of the new Rules, it is provided that a "Court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants, if there is more than one, could have been joined in a single indictment or information." Rule 14 permits severance where prejudice exists. Certainly this Court ought not to permit the ruling of the Second Circuit to stand, to the effect that crimes could be joined in one count or in one indictment, "even though the confederates were not the same in all" (1637).

Ordinarily this point arises for the first time during the trial. However, in this case, the possibility of prejudice was pointed out to the Trial Court by the demurrer (1578, 1584). It was referred to in the opinion denying the demurrer (1592). It was raised many times at the trial on motions to strike, motions to withdraw a juror and to declare a mistrial, objections to testimony, motions to dismiss and motions to compel an election. (961-2, 965-7, 966, 967, 986, 987, 988, 999, 1035-6, 1052-6, 1057 and 1076; 1124-6. 1127, 1128-9, 1521-2, 1562, 1567.)

B

From the foregoing, it appears that the petitioners had apprised the Court that the indictment was but a camouflaged instrument, and that while it pretended to charge only one conspiracy, it was drawn to embrace several separate and distinct offenses. The Court proceeded to instruct the Jury that once a conspiracy was established, the acts and declaration of any conspirator was binding on the others (1549, 5501). There was no limitation by the Court that the acts and declarations of conspirators in one conspiracy could not be used to support a conviction of conspirators in another conspiracy. Thus, our case presents the situation where petitioners may well have been convicted by the jury because of the testimony concerning the incidents at Flushing, when Arnold Weiss, not indicted in this conspiracy, delivered platinum to one Mezenen (969). This Court is respectfully referred to the petition and brief of the petitioners Weiss on this subject. Suffice to say that the Court instructed the jury to the effect that there was only "one charge, one conspiracy" (1562). Specific exception was taken, and the Court was requested to charge the jury to the effect that if there was more than one conspiracy, petitioners should be acquitted (1568—Petitioner Rosenberg's requests, 10 and 14).

The fact remains that on such joint trial of separate conspiracies, it would be considered an incredible enormity, if the Court were to charge that a particular defendant in one conspiracy could be convicted upon testimony inculpating another as a member of another of the conspiracies being tried.

Yet, in our case, the composite effect of the Court's receiving testimony concerning the crimes of others in another conspiracy, as against the petitioners, over their objection and exception and motions to strike out (961, 965, 967, 968,

986, 988, 992, 993, 1023, 1035, 1052, 1057, 1058, 1128, 1129) and then proceeding to make the conventional charge that the acts and declarations of any conspirator binds all (1549, 5501) was to permit conviction of petitioners upon testimony of overt acts in a conspiracy in which they were not involved. Thus a variance which might have been relatively harmless to petitioners, if the proof were confined by the Court to the conspirators involved, was rendered malignant by the refusal of the Court to recognize the existence of the variance and to pattern its instructions and rulings in accordance with the truth as it developed rather than the fiction of the indictment. At any rate, the demonstration that the existence of variance in conjunction with the Court's obliviousness thereto, may lead to consequences of major error, is incidental; the crux of the wrong done petitioners is that they were denied a fair trial when the Trial Court, by its ruling on the admissibility of the extraneous evidence against petitioners bracketed with the conventional conspiracy charge adverted to, held, in inevitable effect, that conviction of petitioners could rest upon testimony concerning crimes in which they were not involved.

V

LIMITED TO PETITIONER EISLER.

The Circuit Court erred in holding that there was sufficient evidence as a matter of law to warrant the submission of the case to the jury as against Eisler.

In this discussion we shall accept the Circuit Court's statement of the evidence against Eisler (1639, 1640). It is important to note their statement that "possibly somewhat more doubt may exist as to the defendants Friedman and Eisler, but, if so, it was a doubt to be resolved by the Jury".

Our position bluntly stated is that there was no issue for the Jury where Eisler was concerned.

The first item of evidence used by the Circuit Court to sustain their position, was an incident alleged to have occurred in Eisler's office (46-7, 417-424, 1244, 1245). Hersch Neumann, co-defendant and principal conspirator, testified that sometime in March, 1941 (44), a quantity of platinum was purchased. It was brought to his office at 50 Pine Street (45). Eisler had an office on the fifth floor of the same building (46). Hersch Neumann further said that he accompanied Rosenberg to the outside of Eisler's office. Rosenberg entered the office, remained a few minutes. Neumann went inside and saw Eisler and Rosenberg talking together. Later Rosenberg told him that he had given the platinum to Eisler (46, 47). We stop at this point to indicate that Eisler steadfastly denied that Rosenberg ever left any platinum at his office (1245). Incidentally, Rosenberg also denied the incident (1151).

Assuming that Rosenberg did have the platinum in his pocket when he entered Eisler's office, there is no direct proof or circumstances from which an inference can be drawn that Rosenberg left platinum in Eisler's office or, that if he did leave it there, he left it with Eisler. Without this proof, there was no evidence against Eisler to connect him with the conspiracy. The testimony of Hersch Neumann was not sufficient to rise to the dignity of proof in a criminal case. The most that can be said is that it could arouse suspicion but certainly it could not be considered as legal proof sufficient to deprive a man of his liberty.

The Circuit Court said that platinum was later received in Lisbon (1639). The testimony showed that the conspirators sent platinum which arrived at Lisbon but that is not proof that Eisler had anything to do with the shipments. Incidentally, the Circuit Court limited Eisler's connection to the first shipment (1639). The Circuit Court

overlooked the Government testimony that platinum was received at Lisbon through others than Eisler (82, 137-8; 2nd and 4th shipments). Thus the receipt of the first shipment has no probative value to connect Eisler with the conspiracy.

The next statement by the Circuit Court is to the effect that Eisler admitted that he knew the First Officer of the "Concalho Velho". That is true. But, the Circuit Court had no justification for stating that "the Jury could properly infer that Eisler engineered the final stages of the shipment", just because he knew the First Officer. There were undoubtedly many people who knew this First Officer, and there were many ways of Neumann and others contacting him. As a matter of fact, there was no definite proof in the case, that the platinum moved on this particular vessel, and certainly, it was error to say that the Jury could "properly infer" that merely because of Eisler's admission that he knew this First Officer, therefore Eisler was a party to a conspiracy. This is certainly pyramiding inference on inference, which this Court has condemned so frequently, particularly in *United States* v. *Ross* (92 U. S. 281).

The Circuit Court then went on to say that "the complicated nature of the transaction was sufficient in itself to tell him [Eisler] that Rosenberg had not been acting alone", and that therefore, even though the full testimony might not show "Eisler's direct knowledge of the full nature of the scheme and of the participation of other conspirators", that the foregoing, however, was "clearly sufficient to make him a conspirator with the others". This statement is directly contrary to this Court's holding in *U. S.* v. *Falcone*, 311 U. S. 205.

Manifestly, a case made up purely of inference built on inference, is all that was presented as against Eisler. Proof that he may have received any financial reward was abor-

tive, and the Government was unable to establish any such fact.

From the fact that the trial of the case took about four weeks, and that the testimony against Eisler covered but a minute portion of the record, it is easy to see that the mere submission of the case to the Jury against him was sufficient to condemn him in their eyes. Thus, the problem discussed under IV herein is revived, and the practice of using testimony of crimes against others, to support a purely hearsay case against Eisler, stands out in bold relief.

The District Judge ruled that conversations between co-conspirators not in the presence of Eisler could be used to prove that Eisler was a member of the conspiracy. To this, specific exception was taken. We quote from the record:

> "I would like to indicate that all of these conversations, not in the presence of Mr. Eisler are objectionable, and I have made motions to strike them out.
>
> The Court: Overruled. If they prove he is a member of the conspiracy, it is all right; if not, it will be stricken out.
>
> Mr. Plaut: Exception" (47).

The Circuit Court made no finding with respect to this error which was raised. However, it was in the light of the District Court's ruling that the jury made its determination of guilt. That the Court's ruling was error is clear. (*Kuhn* v. *U. S.*, 26 Fed. 2d 463, 464; *U. S.* v. *Renda*, 56 Fed. 2d 601, 602; *U. S.* v. *Nardone*, 106 Fed. 2d 41; *Mayola* v. *U. S.*, 71 Fed. 2d 65; *Minner* v. *U. S.*, 57 Fed. 2d, 506, 511; *Thomas* v. *U. S.*, 57 Fed. 2d, 1039, 1041; and finally in *Glasser* v. *U. S.*, 315 U. S. 60, 74, this Court stated:

> "However such declarations are admissible over the objection of the alleged co-conspirator, who was not

present, only if there is proof aliunde that he is connected with the conspiracy."

As we have already said, there was no proof in the record other than this hearsay testimony against Eisler. Small wonder that the Circuit Court said, as to Eisler, "possibly somewhat more doubt may exist" (1639). If some doubt existed in the mind of the Circuit Court after reading the record, with their years of appellate experience and ability to disregard testimony which in no way affected him, what can be said about a jury of laymen, lacking this experience and ability, being called upon to decide this issue upon such ethereal proof.

"Insufficient evidence," said the Court of Appeals of the State of New York, "is, in the eye of the law, no evidence". *Matter of Case,* 214 N. Y. 199, 203-204; *People* v. *Scharf,* 217 N. Y. 204, 211. "Every inference must stand upon some clear, direct evidence and not upon some other inference or presumption." (*People* v. *Racezizs,* 206 N. Y. 249, 270. See also: *Farmer* v. *U. S.,* 223 Fed. 903, 907; *U. S.* v. *Silva,* 109 Fed. 2, 531.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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With him on the brief.

AUG 15 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 325 326

ERNEST WEISS, IRENE WEISZ, FERENC WEISZ and GEZA FRIEDMAN,

Petitioners,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

HAROLD ST. L. O'DOUGHERTY,
Counsel for Petitioners.

JOHN R. STARKEY,
EDWIN F. BLANEY,
On the Petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No.

ERNEST WEISS, IRENE WEISZ, FERENC WEISZ and GEZA FRIEDMAN,

Petitioners,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Ernest Weiss, Irene Weisz, Ferenc Weisz and Geza Friedman, respectfully represent and petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit as follows:

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, Sections 687 and 688 of Title 18, United States Code, and Rule 11 of the Rules of Criminal Procedure. The judgment of the Circuit Court of Appeals was entered on July 17th, 1945.

Opinion Below

The opinion of the Circuit Court of Appeals has not yet been officially reported. It is found in the printed record.

The only opinion of the lower Court is that of United States District Judge Campbell overruling the demurrers by the defendants, Freier, Ferenc Weisz, Ernest Weiss and Irene Weisz, said decision appearing at folios 4759-4781.

Summary Statement

Petitioners seek to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming the judgment of conviction rendered in the District Court for the Eastern District of New York, adjudging petitioners and Josef Rosenberg, Samuel Freier and Hans Eisler, guilty under an indictment charging that between February 1, 1941 and up to April 14, 1942, the date of filing of the indictment, the seven defendants above-named and two other defendants did unlawfully, wilfully and knowingly combine, confederate, conspire and agree, together and with each other and with various persons specified as co-conspirators but not indicted as defendants, to violate Section 701 of Title 50, United States Code, pertaining to the prohibition or curtailment of exportation of military equipment or supplies or component parts thereof, except under such rules and regulations as should be prescribed by the President, and the regulations and proclamations duly promulgated thereunder by the President of the United States, prohibiting after July 5, 1940, the exportation, among other basic materials, of platinum group metals, without a license provided for in the Presidential Proclamation. The indictment further alleged that part of the conspiracy consisted of the purchase of platinum in the United States, its shipment to nations located in Continental

Europe, particularly Portugal, and the use of crew members on vessels and Clipper planes traveling between the United States and Portugal.

A series of overt acts, the last of which allegedly occurred on June 4, 1941, are listed in the indictment.

The petitioners, Irene Weisz, Ferenc Weisz and Ernest Weiss each received a sentence of 13 months in jail and a fine of $500.00. Petitioner Geza Friedman received a sentence of one year and eleven months in jail and a fine of $5,000.00.

The conviction of all defendants was affirmed by the Circuit Court of Appeals for the Second Circuit by decision dated July 17, 1945.

The defendants, Rosenberg, Freier and Eisler, by separate petition submitted in their behalf by James I. Cuff, Esq., their attorney, are also seeking review of the judgment of affirmance.

The Case Against the Defendants

The evidence relates to three separate and distinct conspiracies. In order to set forth the facts as simply as possible, the conspiracy charged in the indictment has been designated as the Main Conspiracy and the other two as the Canadian Affair and the Flushing Affair.

The Main Conspiracy

The Government's case rests, principally, upon the testimony of its chief witnesses, Hersch Neumann and his brother, Abe Neumann, both of whom were named in the indictment as co-conspirators but not as defendants, and Alexander Koppel, a defendant who had pleaded guilty to the indictment before the trial. These witnesses admitted that they were main actors in the conspiracy and testified

that they, together with Arnold Weisz, the defendant Josef Rosenberg and the defendant Samuel Freier, were the persons composing the group which jointly purchased platinum and shipped it, on four occasions between March, 1941, and May, 1941, to Portugal through the medium of crew members of Portuguese vessels. The proceeds of the sale of the platinum involved in the first three shipments were transmitted to the Neumann brothers and, according to them, shared by the persons composing such group.

The persons named in the preceding paragraph are, solely for the sake of clarity, designated as the "partners", and the alleged shipments by sea and any acts in connection with such shipments as the Main Conspiracy.

Arnold Weisz, a brother of the defendants, Ernest Weiss, Irene Weisz and Ferenc Weisz, is named as a co-conspirator but not as a defendant in the indictment. Arnold did not testify at the trial. Rosenberg and Freier are co-defendants. Both pleaded not guilty to the indictment. Both were convicted.

Ernest Weiss had no connection with the Main Conspiracy.

Ferenc Weisz is alleged to have participated in the Main Conspiracy by acting as agent for his brother Arnold Weisz in collecting from the Neumann brothers the share of the proceeds of the third shipment to which Arnold Weisz was entitled. That payment was made while Arnold was in jail (399). It is also alleged that Ferenc Weisz typed an insurance policy whereby one of the "partners", it is claimed, assumed the risk of loss.

Irene Weisz's connection with the Main Conspiracy is limited to allegations that she handled the platinum, attended conferences of the "partners", obtained a pass to one of the Portuguese vessels and acted as a messenger for Arnold Weisz.

Geza Friedman was a close friend of Arnold Weisz. He had written and printed cablegrams and other papers for Arnold Weisz. The chief witnesses did not mention Friedman's name in their testimony relating to the Main Conspiracy.

The Canadian Affair

The principal witnesses testified to alleged acts of the "partners" in a scheme to send platinum to Canada in April, 1941, between the first and second shipments by sea (163). In substance, their testimony relative to this transaction is as follows: Arnold Weisz, in the presence of the other "partners" and Irene Weisz, stated that he had learned from the defendant, Friedman, that a profit could be made by sending platinum from the United States to Canada. Arnold Weisz suggested that they try that method of selling the metal. Irene Weisz offered to take the platinum to Canada but it was decided to use the defendant, Ernest Weiss, who was not present, for that purpose (168). Abe Neumann said that he and Irene Weisz carried some platinum to Ernest Weiss' store in Brooklyn where the defendant, Ferenc Weisz placed it in a suitcase (1470) which Ernest Weiss thereupon took to Montreal (1473). Several days later Ferenc Weisz returned this platinum to the "partners" (209), and it was subsequently sent to Portugal in the second of the four shipments by sea (1488).

Ernest Weiss (4275-6) and Ferenc Weisz (4219) denied that they handled the platinum or that they had seen Abe Neumann at Ernest's store. Ernest Weiss explained that he had gone to Canada to obtain a visa for Arnold (4271, 4277). Friedman denied any knowledge of the transaction (3846).

The Flushing Incident

The Government produced other witnesses who testified to a scheme by which Arnold Weisz exported platinum to Portugal using stewards employed on the Clipper planes flying between the United States and Portugal.

The witness, Rene Mezenen, named in the indictment as a co-conspirator but not as a defendant, testified that he had been a Flight Steward on the Clipper and had met Arnold Weisz some time late in 1940, or in the early part of 1941. In May, 1941, Arnold Weisz telephoned the witness at his home in Flushing, New York (2907), subsequently called to see him "during the early part of May, 1941" (2908), and "a couple of nights later" gave him some platinum and delivery instructions (2910-2911). Mezenen turned the metal over to another steward, Mario (2912), named in the indictment as co-conspirator but not a defendant.

Some time between three and seven days later, during which period Arnold Weisz informed Mezenen that the first shipment had been received in Lisbon, Arnold Weisz and Mezenen met again and a second delivery was consummated (2913-15). On the evening of June 4, 1941, Arnold Weisz, accompanied by the defendant, Geza Friedman, called at Mezenen's house in a taxicab. Weisz met Mezenen on the street and then returned to the taxi, obtained a package of platinum and delivered the package and written delivery instructions to Mezenen (2928-2932). Friedman took no part in the transaction, remaining in the taxi, and was not seen by Mezenen (2928-2947). The following day Mezenen was arrested with the platinum in his possession (2948). Arnold Weisz was taken into custody shortly thereafter.

Platinum had been purchased by one Felsenberg, using the name of Schreiber, with funds furnished by Arnold

Weisz (2885). Felsenberg made three purchases for Arnold Weisz at the firm of Kastenhuber & Lehrfeld, and one purchase from Jos. B. Cooper & Sons, Inc. (2886). Mezenen testified that the platinum parcels Arnold Weisz had delivered to him were accompanied by letterheads of Kastenhuber & Lehrfeld upon which had been printed some figures relative to the amount and quality of the platinum (2912, 2915). Felsenberg was not named as a co-conspirator. He testified that he dealt with Arnold Weisz alone (2890), did not know the Neumanns (2888), and had never been asked by either Rosenberg or Koppel to purchase platinum (2889).

Arnold Weisz did not disclose to Hersch Neumann or to any of the other "partners" the fact that he was dealing with Mezenen and shipping platinum abroad on the Clipper (504). Hersch Neumann had never been involved in any transaction in which the Clipper had been used, nor did anyone ever tell him that such a method of exportation had been used (505). Hersch Neumann had been a party to all transactions of the "partners" and "in every one of those shipments it was purely the use of boats" (506).

Geza Friedman testified that he had accompanied Arnold Weisz on the trip, by subway and taxicab, to Flushing on the evening of June 4, 1941 and that he did not learn that the package contained platinum until he and Arnold were returning home from Flushing (3870). Friedman did not know Mezenen (3848). Holtzmann, F. B. I Agent, testified that Friedman at first denied that he had seen Arnold Weisz on June 4, 1941, and when later identified by the taxicab driver, Carlson, stated that he had nothing to say (1044). F. B. I Agent Sizoo testified that about a week after Arnold's arrest, Friedman told Sizoo that Arnold, on their way to Flushing, had stated that the package contained platinum (3212).

Questions Presented

(1) Whether the Court erred in overruling the demurrer interposed to the indictment by the petitioners, Irene Weisz, Ferenc Weisz and Ernest Weiss, raising the question of the unconstitutionality of Section 701 subd. 6 of Title 50 USC; the failure of the indictment to state facts sufficient to constitute a crime against the United States; the duplicity of the indictment in that it charged more than one conspiracy in a single count; the lack of authority in the President of the United States to promulgate rules and regulations contained in the executive order of July 2, 1940; the indefiniteness and uncertainty of portions of the said executive order, and the prosecution of the petitioners after June 30, 1942 when the authority under the original enactment ended.

(2) Whether the Court erred in denying petitioners' motions (a. to strike from the record; b. to dismiss; c. to direct a verdict of acquittal; d. to compel the United States Attorney to elect) made at the close of the Government's case and renewed at the close of the entire case. Exceptions were properly noted.

(3) Whether the Court erred in denying petitioners' motions to set aside the verdict. Exceptions were properly noted.

(4) Whether the Court erred in denying the petitioners' motions in arrest of judgment. Exceptions were properly noted.

(5) Whether the Court erred in the admission of evidence concerning the acts and conduct of co-conspirators. Exceptions were properly noted.

(6) Whether the Court erred in admitting testimony concerning the alleged Canadian transaction. Exceptions were properly noted.

Reasons Relied On for the Allowance of the Writ

1. The Circuit Court of Appeals has passed upon the constitutionality of the Statute upon which the indictment is based i.e. Section 701 of Title 50 USC. This act clearly grants legislative powers to the President and falls within the type of legislation proscribed in *Schecter Poultry Corp.* v. *U. S.*, 295 U. S. 495; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *U. S.* v. *Butler,* 297 U. S. 1.

2. The Act upon which the indictment is based terminated before the trial and was not extended by Act of June 30th, 1942 (56 Stat. 463).

3. There is a fatal variance in that the indictment charges one conspiracy and the proof relates to three wholly disconnected offenses. *Berger* v. *U. S.*, 295 U. S. 78; *U. S.* v. *Siebricht* (C. C. A.), 59 Fed. 2d 976; *Terry* v. *U. S.* (C. C. A.), 7 Fed. 2d 28.

4. The petitioners were not accorded a fair and impartial trial. The jury was permitted to consider hearsay evidence, as well as evidence of financial affairs of some of the defendants not shown to be connected with the alleged conspiracy, all of which was highly prejudicial.

WHEREFORE petitioners pray that a writ of certiorari issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for review and determination, as provided by law,

this cause and a complete transcript of the record and of all proceedings had therein, and that the order of the United States Circuit Court of Appeals affirming the conviction of petitioners in this case may be reversed and that petitioners have such other and further relief in the premises as this Court may deem proper.

Dated: August 14, 1945.

HAROLD ST. L. O'DOUGHERTY,
Counsel for Petitioners.

JOHN R. STARKEY,
EDWIN F. BLANEY,
On the Petition.

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

Dated: August 14, 1945.

HAROLD ST. L. O'DOUGHERTY,
Counsel for Petitioners.

JOHN R. STARKEY,
EDWIN F. BLANEY,
On the Petition.

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No.

ERNEST WEISS, IRENE WEISZ, FERENC WEISZ and GEZA FRIEDMAN,

Petitioners,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

1. Jurisdiction

The facts with regard to jurisdiction have been set forth in the foregoing petition.

2. Statute and Regulations Which Are Involved Herein

The statute allegedly violated read as follows: (Sec. 6, Chap. 508, 54 Stat. at L. 712): "An Act to expedite the Strengthening of the National Defense."

"Sec. 6. Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. * * * (Penal Provision) * * * The authority granted by this section shall terminate June 30, 1942, unless the Congress shall otherwise provide."

On July 2, 1940 (Government's Exhibit 1, in evidence) the President issued his Proclamation No. 2413 whereby the administration of Sec. 6 was delegated to an Administrator of Export Control and it was further proclaimed that on and after July 5, 1940, certain named articles and materials should not be exported from the United States, "except when authorized in each case by a license" issued by the Secretary of State in accordance with the rules to be stated from time to time by the said Administrator. Among the named articles was "Q—Platinum Group Metals."

3. Statement of the Case

The basic facts have been stated in the foregoing petition. Certain other facts will be called to the attention of the Court, particularly in the point discussing the evidence before the Trial Court.

4. Summary of Argument

1. The Circuit Court of Appeals erred in holding that there was no variance from the charge of a single con-

spiracy to the proof of three separate and distinct conspiracies.

2. The Circuit Court of Appeals erred in holding that the statute upon which the indictment is based is constitutional.

3. The Circuit Court of Appeals erred in holding that the statute upon which the indictment is based did not terminate on June 30, 1942, but was extended by Act of June 30, 1942.

4. The Circuit Court of Appeals erred in holding that the defendants were not prejudiced by irrelevant evidence and that the evidence was sufficient to sustain the convictions.

5. The Circuit Court of Appeals erred in holding that the trial Court did not commit reversible error in admitting platinum and Friedman's bank records as part of the Government's case against all of the defendants.

5. Argument

POINT I

The Circuit Court of Appeals erred in holding that there was no variance from the charge of a single conspiracy to the proof of three separate and distinct conspiracies.

This proposition is also considered and discussed in the brief submitted on behalf of the defendants Rosenberg, Freier and Eisler.

A fatal variance occurred affecting the substantial rights of the defendants. Three different and disconnected conspiracies were proven at the trial.

Berger v. *United States*, 295 U. S. 78;
United States v. *Siebricht* (C. C. A. 2) 59 F. 2d 976;
Terry v. *United States* (C. C. A.) 7 F. 2d 28.

There was a material variance in this case. The indictment charges one offense, the proof adduced by the Government show three distinct different offenses. The *main conspiracy*, which is the one alleged in the indictment involved the defendants Rosenberg, Freier, the Government witnesses, Koppel, Abe and Hersch Neumann, and the named co-conspirator Arnold Weisz. The defendant Eisler is involved in this conspiracy through hearsay. The *Canadian conspiracy* involved the same group, except Eisler, and allegedly included the defendants Ernest Weiss, Irene and Ferenc Weisz. The third conspiracy, adduced by the Government were the dealings between Arnold Weisz and the named conspirator in the indictment, Mezenen. The defendant Friedman is brought into the case by reason of this third conspiracy in view of his association with Arnold Weisz.

The *main conspiracy* and the *Canadian conspiracy* are definitely different offenses, one involved shipments to Portugal, the other a shipment to Canada. The indictment charges no crime in connection with Canada. The Court however allowed testimony of the *Canadian conspiracy* since the platinum there involved was later used in connection with the *main conspiracy*. The third conspiracy (*Flushing affair*) is wholly unrelated to the other two. The dealings of Arnold Weisz and Mezenen were not part of or the same venture of the defendants in the *main* and *Canadian* conspiracies.

Since different conspiracies were proven and only one conspiracy is charged, a material and fatal variance occurred.

United States v. *Siebricht* (C. C. A. 2) 59 F. 2d 976.

The variance charged here is one which clearly affected the substantial rights of the parties.

Berger v. *United States,* 295 U. S. 78.

It is settled law that where one conspiracy is charged, proof of different and disconnected ones will not sustain a conviction.

POINT II

The Circuit Court of Appeals erred in holding that the statute upon which the indictment is based is constitutional.

This proposition is also fully considered and discussed in the brief submitted on behalf of the defendants Rosenberg, Freier and Eisler. This Court is respectfully referred to that brief for the authorities and full discussion of this constitutional question.

Sec. 6 of the Act of July 2, 1940 (54 Stat. at L. 714) upon which the indictment is based, clearly grants legislative powers to the President. It falls within the type of legislation proscribed in the N. R. A. cases,

Schechter Poultry Corp. v. *United States,* 295 U. S. 495;
Panama Refining Co. v. *Ryan,* 293 U. S. 388;

and also

United States v. *Butler,* 297 U. S. 1.

The statute here involved is not one involving foreign affairs, such as the one sustained in *United States* v. *Curtiss-Wright Exp. Co.*, 299 U. S. 388, but is definitely one involving an internal affair, which is within the sole province of Congress to control and determine (*Gorin* v. *United States*, 312 U. S. 19; *United States* v. *Schwimmer*, 279 U. S. 644, 650). This statute is clearly distinguishable from the one before the Court in the case of *United States* v. *Von Clemm*, 136 F. 2d 968. In the *Von Clemm* case the statute and the order of the President fell within the "sphere of foreign relations and is thus free from the limitations imposed on delegated authority"; and in that case it is important to note the Order of the President was confirmed and approved by a retroactive act of Congress, thereby curing the question of improper delegation in the original statute. Sec. 6, here, dealing with our national defense, does not fall within the "sphere of foreign relations", our national defense is an internal matter; nor was the President's Order, which the defendants here allegedly violated, confirmed by any subsequent act of Congress.

Sec. 6, it is submitted, was definitely an improper delegation of power to the President. As such the statute being void, the judgment against the defendants must be reversed and the indictment dismissed.

POINT III

The Circuit Court of Appeals erred in holding that the statute upon which the indictment is based did not terminate on June 30, 1942, but was extended by Act of June 30, 1942.

This proposition is likewise fully discussed in the brief submitted on behalf of the defendants Rosenberg, Freier and Eisler and this Court is respectfully referred to such discussion for the authorities in support of this Point.

Sec. 6 of the Act of July 2, 1940 (54 Stat. at L. 714) upon which the indictment here is based, expired on June 30, 1942. This statute was a peace-time measure and related to strengthening the national defense. Section 6 particularly, referred to military articles and their exportation. Said statute contained no savings clause.

On June 30, 1942, Congress passed 56 Stat. at L. 463. This Act intended to amend Sec. 6 of the Act of July 2, 1940. The Act of June 30, 1942, however, was a war-time measure. It extends the power of the President, it covers all articles of exportation and is not limited to military articles, it grants power to the Board of Economic Warfare in the execution of the Act, and it contains a savings clause.

It is submitted that the Act of July 2, 1940, was impliedly repealed by the Act of June 30, 1942. The two acts are different and one is not an amendment of the other so that the first Act is kept alive for purposes of prosecution for a violation of it before such alleged amendment.

> *United States* v. *Tynen,* 11 Wall. 88;
> *Posadas* v. *National City Bank,* 296 U. S. 497, 503;
> *Murphy* v. *Utter,* 186 U. S. 95, 105;
> 59 *Corpus Juris* 919.

Since Sec. 6 contained no savings clause and the defendants were brought to trial after its termination, the prosecution was therefore improper and the judgment of conviction herein must be reversed.

> 22 C. J. S. Criminal Law, Sec. 27, p. 79, and cases cited therein under note 87.

POINT IV

The Circuit Court of Appeals erred in holding that the defendants were not prejudiced by irrelevant evidence and that the evidence was sufficient to sustain the convictions.

A conspiracy is a partnership for criminal purposes.

U. S. v. *Kissel,* 218 U. S. 601, 608.

The Neumann brothers and Koppel showed no concern for any of the persons charged by the Government with having had any connection with the platinum exportation. It must be presumed that these chief witnesses did not omit anything. On their testimony, it is evident that they, themselves, did not consider the defendants Geza Friedman, Ernest Weiss, Irene Weisz and Ferenc Weisz as associates. None of these defendants contributed to the funds invested in platinum and none shared in the proceeds of sale.

Each has been brought in by a series of unrelated acts, by their own bank records, by hearsay statements or by suspicion aroused by reason of their relationship with Arnold Weisz.

The argument with respect to the insufficiency and prejudicial effect of the evidence against the defendants Geza Friedman, Ernest Weiss, Irene Weisz and Ferenc Weisz is separately set forth below.

Geza Friedman

The testimony of the Government's chief witnesses, Hersch Neumann, Abe Neumann and Alexander Koppel established beyond doubt that Friedman was not a "partner" in the Main Conspiracy.

Friedman's name first appears in the record in Hersch Neumann's testimony (166) in which the witness said that the "partners", during the week of April 7, 1941 (163), discussed the possibility of sending platinum to Canada. Neumann said that Arnold Weisz told the "partners" that he had learned from Friedman (upon Friedman's return from Canada) that a profit could be made by sending platinum to Canada. That "hearsay" statement is the sole link connecting Friedman with the "Canadian Affair".

Friedman had actually gone to Canada on March 13, 1941, to obtain a permanent visa (3830). That he made the trip for that purpose has never been disputed. He denied that he had talked to Arnold Weisz about exporting platinum to Canada (3846). Arnold Weisz did not testify.

The indictment had cited Friedman's trip to Canada as one of the overt acts (#11) in furtherance of and for the purpose of effecting the object of the conspiracy. When Friedman's counsel objected to Neumann's remark about Friedman, the Court stated that it would be stricken out if the Government failed to "connect it up" (167). Yet the Court, in its charge to the jury, asked the following question: "did he (Friedman) when he went to Canada, prior to April 9, make inquiries as to the price of platinum?" (4668).

Hersch Neumann's remark (166) was heard by the jury on September 23, the first day of the trial. The Court's charge was given on October 22. Thus the jury was directed to consider hearsay evidence, presented a full month before, in deciding whether Friedman had inquired in Canada about the price of platinum, and, if they concluded that he did so, to weigh that finding against him in deciding that he knew about the scheme to export platinum to Continental Europe and had agreed to take some part in the venture.

He had gone to Canada on March 13 and had been with Arnold Weisz in Flushing on June 4, 1941, a period em-

bracing almost the entire life of the conspiracy. If the jury decided that Friedman knew about the platinum dealings of the conspirators before March 13th, it is certain that no consideration would have been accorded his protestations that he had been an innocent participant in the "Flushing Affair".

Friedman's bank records were put in evidence by the Government (4063-4069) and the fact brought out that he had deposited about $30,000 in the first seven months of 1941 (4070). The inference was plain enough—that Arnold was sharing his illegal profits with Friedman (4062). But a full explanation by him of his finances was not permitted (4079-4083). Yet the Court in its charge to the jury (4673) after referring to these bank records and, particularly, to the deposits of $7,700.00 made in April, 1941 (4062), asked: "Now, where did that money come from?" thereby not only creating a basis for speculation by the jury but also indicating that it was dishonest money.

Where, indeed, did Friedman's money come from? Or specifically, in view of the Court's emphasis upon the figure, where did the April, 1941, deposits of $7,700.00 come from? The record clearly shows where these deposits *did not come from!*

In connection with the principal conspiracy, the Neumanns received the proceeds of the sale of the first shipment in April (1433). But Arnold's share was less than $1,000.00 (1462). The proceeds of the second shipment were not received until May 12, 1941 (1502). Arnold Weisz had been arrested on the conspiracy charge and was still in jail when the proceeds of the third shipment had been received (399). The "partners" never recovered the proceeds of the fourth shipment (838). Mezenen testified that two shipments by Clipper were consummated (2912-15), but the first shipment did not go to Lisbon until some time in May (2910-11). Arnold Weisz could not have received

the proceeds of the Clipper shipments until the latter part of May.

The conclusion is inescapable that Friedman's April deposits of $7,700.00 (which, incidentally, exceeded his average monthly deposits), did not include Arnold Weisz's illegal profits in the conspiracy charged in the indictment. These funds, therefore, must be presumed to have been honestly acquired by Friedman. It follows that there was no "access of wealth" as described by the learned Circuit Court (p. 2198 of the Decision) which held that the Trial Court committed no reversible error in admitting Friedman's bank statements showing "large deposits during the period here involved" (p. 2197 of the Decision).

Another element presented by the Government in support of its case against Friedman is the fact that Friedman had printed or written various cables and other papers for Arnold Weisz. It is contended by the Government (and obviously accepted as a fact by the Circuit Court) that Friedman wrote the delivery instructions given Mezenen, but the record is confusing in that regard.

Arnold Weisz lived in Friedman's home. Friedman testified that on occasions Arnold had asked him to write cables or post cards or to address letters (3879). At Arnold's request, Friedman, some time after his return from Canada, accompanied Arnold to an attorney, Berger, who was told by Arnold that he intended to export platinum. Arnold retained Berger to inquire about a license (3841-3845). Friedman explained that he did not know there was anything wrong with Arnold's handling of platinum (3957).

As stated above, the record relating to the delivery instructions given by Arnold Weisz to Mezenen is confusing. Government Exhibits 52 to 58 were identified by Mezenen (2935-2947). Exhibit 54 contained only a name and address written in ink. Miller, an F. B. I. employee, gave an opinion that Friedman wrote the name and address, but the

identity of the person who prepared Exhibit 58, a letter of instructions, was not brought out. The Court, in its charge to the jury, mentioned "letters" written by Friedman for Arnold Weisz but did not remind the jury that the Government had not connected Friedman with the letter of instructions introduced as Exhibit 58.

Arnold Weisz's scheme to export platinum by Clipper plane was unquestionably a solo venture. He concealed from his "partners" his association with Mezenen (504-6). To obtain the platinum he delivered to Mezenen, Arnold used Felsenberg, obviously because he did not want the others to know about it. A very significant fact in connection with the purchase of the platinum used for the Clipper shipments is that Arnold Weisz did not employ Friedman for that purpose. The record shows that the "partners" were not particularly secretive in buying the platinum used in the shipments by sea.

The Government contends that there was sufficient circumstantial evidence to warrant the finding of the jury insofar as Friedman is concerned. But the evidence is lacking in substance and does no more than create a suspicion of the existence of the fact to be established. It is settled law that where a finding is based upon circumstantial evidence "the circumstances relied upon must be not only consistent with the guilt of the defendants, but must be inconsistent with their innocence." *Shannabarger* v. *United States* (C. C. A. 99 F. 2d 957, 961).

In accord see:

Zito v. *United States* (C. C. A. 7) 64 F. 2d 772, 775;

Young v. *United States* (C. C. A. 5) 48 F. 2d 26, 27;

Kassin v. *United States* (C. C. A. 5) 87 F. 2d 183, 184;

Dahly v. *United States* (C. C. A. 8) 50 F. 2d 37, 43.

The cumulative effect of the speculations and inferences created by the testimony and evidence in connection with Friedman and the further inferences, innuendos and speculations presented in the charge to the jury, clearly presented a situation to the jury, that even if this defendant (Friedman) was not a member of the conspiracy group, he must be guilty of something;—all that money, living with one of the conspirators, doing him favors, lending him money, taking him to a lawyer, sending a cable using the letter "P". The Court said in *United States* v. *Silva,* 131 F. 2d 247, 249:

> "* * * There is no magic about a count charging conspiracy. It is simply an accusation of a distinct crime and evidence in support of it must be so clear and convincing as to leave no reasonable doubt. The government merely fails in its proof when its evidence but creates a sort of a mystery as to which one guess is as good as another. *Copeland* v. *United States,* 5 Cir. 90 F. 2d 78; *Shannabarger* v. *United States,* 8 Cir. 99 F. 2d 957; *Kassu* v. *United States,* 5 Cir. 87 F. 2d 183.
>
> "Reversed."

The words of the Circuit Court in the case of *Marcante* v. *United States* (10th Cir.) 49 F. 2d 156, is apropos in view of the attending factors here involved (p. 158):

> "* * * If it extremely difficult for an experienced judge to trace the skeins of scattered testimony to so many individuals; with inexperienced jurors, such complicated testimony is too apt to become a confused jumble and a verdict to represent an impression that the defendants are guilty of something, with little reference of the crime for which they are charged."

It is submitted that the evidence against Friedman is insufficient, and that the doubt which may have existed, according to the Circuit Court of Appeals, should have been resolved in his favor.

Ernest Weiss

Financial records also play an important part in the Government's case against Ernest Weiss. A statement from Ernest Weiss' bank (Gov't Ex. 37b) showed that on May 8, 1941, there was credited an item of $8,943 (1394). This amount had been forwarded by one Pancado Mores from Portugal (4329). Ernest Weiss paid the full amount to his brother, Arnold Weisz (4324), who was in the business of foreign exchange (2348).

The brief of the United States on the appeal to the Circuit Court cited this deposit in the summary of the evidence against this defendant. It is mentioned again in the decision affirming the conviction (p. 2196 of the Decision) in which the Circuit Court said:

> "In addition to Ernest Weiss's activities in connection with the Canadian transaction, the evidence showed a payment to his bank account from the Chase National Bank of $8,943; and the jury was not limited in the inferences it might draw by his own testimony that he knew no more than that this money belonged to his brother Arnold and that he paid it all to Arnold."

But the record again indicates that this money could not have represented funds payable to Arnold Weisz in connection with the criminal activities charged in the indictment.

It is obvious that the Pancado Mores payment could not have arisen out of the Main Conspiracy. Abe Neumann paid Arnold Weisz less than $1,000. as his share of the first shipment (1462). The Neumanns received the full proceeds of the second shipment on May 12, 1941.

A careful reading of the testimony of the Government's witness, Mezenen (2907-2910) shows that the first package of platinum involved in the "Flushing Affair" was not delivered in Portugal until after May 8th, the date the sum of $8,943. had been credited to Ernest Weiss' bank account in New York.

Ernest Weiss allegedly took some platinum to Canada and he returned this platinum to his brother Arnold without disposing of it. Arnold Weisz returned the platinum to his group of co-conspirators, Abe Neumann, Hersch Neumann, Koppel, Rosenberg and Freier. The group thereafter used this platinum for shipment to Portugal. Ernest Weiss was not a member of this group. There is not a bit of evidence to make him a party to the conspiracy charged in the indictment.

The Court in its charge to the jury, however, charged if Ernest Weiss knew that the platinum he brought back was to be used by his brother and others for the offense charged in the indictment, such knowledge could be considered by the jury in determining whether "he was a part and parcel of the conspiracy.". The Court in its charge said (4663-4666):

> "Of course, the exportation to Canada is not the crime charged in the indictment herein; and if it was his (Ernest Weiss) only act in relation to the conspiracy charged in the indictment, he would not be guilty. But did he do more than that? Did he bring back to this country the platinum which had been given to him to take to Canada, with the knowledge of the desire of his brother and the others who may have been conspirators, to sell at a large profit abroad? And therefore, you must consider whether in doing that, if he was doing something more than the taking of the platinum to Canada, and whether bringing it back where it might be sold abroad, if he knew that is what they were doing

with the platinum and that was the reasonable use to which it was to be put, then it is for you to say whether or not he was a part and parcel of the conspiracy.

"• • • Was he part and parcel of this conspiracy, or was he just a side issue, whose only part in the transaction was to go to Canada with some platinum to sell, or, in fact, he did not take any platinum at all? And if he did take, when he brought it back, did he know he was bringing it back to be used for transportation?

"Of course, you have to judge the actions not only by the spoken word, but by the surrounding circumstances. Was the man just used for this particular purpose, without any knowledge, or did he know what was going on; and did he lend himself to the scheme? The selling in Canada would not have been sufficient to charge him with this conspiracy alleged in this indictment. And if he sold the platinum in Canada, that would have been the end of it, but he did not sell it; he brought it back. What did he bring it back for? Did he know the use to which it was intended to be put?"

It is clearly indicative that Ernest Weiss' guilt of the crime charged was to be based on his knowledge of the subsequent acts of the main conspirators.

There is no proof that Ernest Weiss was part of the plan or scheme charged in the indictment. "Conspiracies cannot be established by a mere suspicion nor does the evidence of mere relationship between the parties or association show a conspiracy" (15 C. J. S. *Conspiracy* Sec. 93, p. 1150). The fact that Ernest Weiss may have had knowledge of the conspiracy, did not *ipso facto* make him privy to it. There must be some evidence to show that Ernest Weiss agreed to take some part in the venture.

United States v. *Kissel*, 218 U. S. 601, 608;
United States v. *Dellaro* (C. C. A. 2d), 99 F. 2d 781.

The fact that Ernest Weiss committed a wrong in taking the platinum to Canada cannot by implication involve him in another wrong committed by others who used the same platinum, regardless of whether he knew the subsequent use to be made of the platinum by the others. It is submitted that the Court erred in submitting the case against Ernest Weiss on the theory of knowledge on his part as to the use of the platinum "to which it was intended to be put" by the group of which he was not a member. In support of this proposition, this Court is referred to the decision in the case of *United States* v. *Peoni*, 100 F. 2d 401, where the defendant Peoni in the court below was found guilty of a conspiracy to possess counterfeit bills. The evidence in that case showed that Peoni sold the counterfeit bills in question to one Regno; and Regno sold the same bills to Dorsey. Peoni was convicted of being an accessory to Dorsey and a co-conspirator to a plan whereby Dorsey obtained possession of the bills for utterance. The Court reversed the conviction, saying at page 402:

> "• • • Peoni was not an accessory to Dorsey's possession; his connection with the business ended when he got the money from Regno, who might dispose the bills as he chose; it was no moment to him whether Regno passed them himself and so ended the possibility of guilty possession or (p. 403) whether he sold them to a second possible passer. His utterance of the bills was indeed a step in the casual chain which ended in Dorsey's possession, but that was all. Perhaps he was Regno's accessory.
>
> "• • • • •
>
> "The same reasoning applies to the conspiracy count. Assuming that Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say

that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody besides Regno might get them, but a conspiracy also imparts a concert of purpose, and again Peoni had no concern with the bills after Regno paid for them. At times it seemed supposed that, once some kind of criminal concert is established, all parties are liable for everything any one of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it. The confusion is perhaps due to the fact that everything done by the conspirators—including the declarations of later entrants—is competent evidence against all, so far as it may fairly be thought to be in execution of the concert to which the accused is privy, though that doctrine too is often abused."

The Court's enunciation in *United States* v. *Falcone*, 109 F. 2d 579, aff'd 311 U. S. 205 is also applicable, where it said (581):

"• • • Civilly, a man's liability extends to any injuries which he should have apprehended to be likely to follow from his acts. • • • There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy • • •, his attitude • • • must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an

unlawful use; he must in some sense promote the venture himself, make it his own, have a stake in its outcome."

The proof here is insufficient to make Ernest Weiss one of the conspirators involved in the count charged in the indictment. He did not "in some sense promote the venture himself, make it his own, have a stake in its outcome."

See:

United States v. *Silva* (C. C. A. 2), 131 F. 2d 247.

The evidence creates no more than a suspicion, and as such was insufficient to support a conviction.

Center v. *United States* (C. C. A. 4), 96 F. 2d 127, 130.

"Circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt" (*Kassin* v. *United States* (C. C. A. 5), 87 F. 2d 183, 184).

The Government for want of evidence to connect Ernest Weiss with the crime charged created inferences from his connection with another offense and his relationship with his brother Arnold who was one of the alleged co-conspirators. No one connected with the crime charged identified Ernest Weiss as one of the "partners" to the venture. Suspicion or conjecture cannot take the place of evidence.

The conviction of Ernest Weiss, it is submitted must be reversed.

See:

Gerson v. *United States* (C. C. A. 8), 25 F. 2d 49;
Caringella v. *United States* (C. C. A. 7), 78 F. 2d 563, 566;

Dahly v. *United States* (C. C. A. 8), 50 F. 2d 37, 43;

15 C. J. S. *Conspiracy* Sec. 93, p. 1150, and cases cited in notes 79, 80, 81.

Ferenc Weisz

There is really nothing against the defendant Ferenc Weisz insofar as the conspiracy charged in the indictment is concerned. His alleged connection with the Canadian affair cannot by inference, as we have shown in regard to Ernest Weiss, be used as the basis to make him "part and parcel of the conspiracy". The proof shows that his brother Arnold Weisz called Ferenc Weisz to the office of the "partners" of the main conspiracy to type an insurance agreement entered into between defendant Freier and Arnold Weisz, after one of the "partners", Abe Neumann, refused to type the same unless he was paid $5 (1644). At the request of his brother Arnold, Ferenc Weisz called to get moneys due Arnold from the conspirators, Hersch and Abe Neumann (344, 399). Again at his brother's request he allegedly delivered the package of platinum returned from Canada (209).

The Government's witness, defendant Koppel, testified that he had general conversations with Ferenc Weisz about platinum, but such talks were all outside of the conspiracy. This is the extent of Ferenc Weisz's participation.

Does this participation make Ferenc Weisz a "partner" to the conspiracy charged in the indictment? He had no stake in the conspiracy. There is no proof to show that Ferenc Weisz joined the conspiracy partnership. Such participation without an agreement to join the conspiracy cannot make Ferenc Weisz one of the co-conspirators. In the case of *Dahly* v. *United States* (C. C. A. 8), 50 F. (2d) 37, the general rule which should be applied here is stated (p. 43)

"Circumstantial evidence is equally available with direct evidence to prove the conspiracy, but suspicion and conjecture cannot take the place of the evidence. Guilt must be established beyond a reasonable doubt, and where the evidence is consistent with innocence as with guilt no conviction can properly be had. Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement and participation therein, * * *."

The proof in the case at bar does not show that Ferenc Weisz joined or participated in any agreement with the conspirators. Such evidence is lacking.

Lucadamo v. *United States* (C. C. A. 2), 280 F. 653, 657;
Marrash v. *United States* (C. C. A. 2), 168 F. 225, 231.

And as was said in *Marino* v. *United States* (C. C. A. 9), 91 F. 2d 691 at page 695:

"On the other hand, an accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the statute unless he joined in the agreement."

(See copious citations of authority under notes 20 and 21 in the *Marino* case.)

The evidence against Ferenc Weisz, it is submitted, is too weak to sustain a conviction.

She may have participated in the Canadian affair, which, however, is not the crime charged in the indictment. In connection with the conspiracy charged, the testimony in the record reveals that Irene Weisz carried some platinum to her brother Arnold's office; but was not present when the platinum was delivered Silva for exportation (1491). That she was present when Koppel asked his "partners" for a pass to board the boat "Guine" (251) and she volunteered to get such a pass and obtained it for Koppel. This is the extent of her participation. It is significant that she was never present at conferences of the "partners" concerning the vital matters of their venture; and on one occasion she was told to step out of the room while the "partners" discussed something important (2783).

It is submitted that the evidence is inadequate to sustain Irene Weisz's conviction.

POINT V

The Circuit Court of Appeals erred in holding that the trial court did not commit reversible error in admitting platinum and Friedman's bank records as part of the Government's case against all of the defendants.

The defendants Ernest Weiss, Ferenc and Irene Weisz clearly had no connection with Mezenen nor were they in any way associated with Friedman. These defendants were not concerned with any conspiracy to export platinum through Mezenen and Mario via Clipper. Arnold Weisz's dealings with Mezenen were definitely extraneous and no part of any conspiracy involving these defendants. Nor was Friedman in privy with them. Yet the proof attending

Friedman's alleged connection with the extraneous deals of Arnold Weisz was admitted into evidence as against these defendants, as part of a single offense.

The *only* platinum introduced at the trial was the platinum found on Mezenen. The defendant Friedman made large bank deposits during the times alleged in the indictment. The source of these deposits was not shown by the Government still the Court allowed them into evidence, leaving it to the jury to decide on inferences and not on evidence where these deposits came from.

The introduction of the platinum (Exh. No. 51) was prejudicial and affected these defendants' substantial rights. This platinum was foreign to the activities and offense charged against them, yet this evidence is given to the jury as evidence against these defendants. This would be analogous to a situation where A and B commit a robbery, B and C commit another, and A is convicted on the money found on C.

The effect of the introduction of some platinum in the case can be readily surmised. For seven days the jury heard testimony about the precious metal, but saw no metal. And then, the F. B. I. produced the valuable metal for all to behold! The Court ruled it was admissible against all the defendants. So the defendants, here, are found guilty on platinum found on one Mezenen—a total stranger to them and by no stretch of the facts a co-conspirator.

The jury for days heard testimony on the shares contributed by each conspirator in each shipment. Each one's share was comparatively small. The defendants here contributed nothing. The bank accounts of Friedman (definitely not a co-conspirator) are at a later time introduced *en masse* by the Government. The Government shows no connection between these deposits and platinum or any conspiracy involving these defendants. The deposits are suspiciously large. Where did Friedman get the money?

The effect of this evidence is apparent. It served only the one purpose of implicating all the defendants with these unusual deposits.

It is submitted that this evidence, and the inferences raised by reason of its presence in the case was highly prejudicial and constituted reversible error as against the defendants Ernest Weiss, Irene and Ferenc Weisz.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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On the Brief.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 325

JOSEF ROSENBERG, SAMUEL FREIER AND HANS EISLER, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 326

ERNEST WEISS, IRENE WEISZ, FERENC WEISZ AND GEZA FRIEDMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and concurring opinions in the circuit court of appeals (R. 1630–1641) have not yet been reported. The opinion of the district court overruling demurrers to the indictment (R. 1587–1594) is reported at 47 F. Supp. 406.

JURISDICTION

The judgment of the circuit court of appeals was entered July 17, 1945 (R. 1641). The petitions for writs of certiorari were filed August 15, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the Act of July 2, 1940, granting the President power to prohibit or curtail exports of military equipment or component parts thereof, represented an unconstitutional delegation of legislative power to the executive.

2. Whether the regulations issued by the President prohibiting the export of specified materials without a license were invalid for the reason that they failed to specify the conditions upon which a license would be granted.

3. Whether the Act of 1940 expired in 1942 despite the fact that the Act of June 30, 1942, purported to extend it.

4. Whether the evidence is sufficient to support the verdict against certain of the petitioners.

5. Whether there was a fatal variance between the indictment and the proof as to the number of conspiracies covered by the indictment.

STATUTES AND REGULATIONS INVOLVED

Section 6 of the Act of July 2, 1940, 54 Stat. 712 (50 U. S. C. App. 701), in pertinent part provides:

> Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment. The authority granted in this section shall terminate June 30, 1942, unless the Congress shall otherwise provide.

The Act of June 30, 1942, c. 461, 56 Stat. 463, provided in pertinent part as follows:

> That section 6 of the Act of July 2, 1940 (54 Stat. 714) is hereby amended to read as follows:
>
> * * * * *

> (d) The authority granted by this section shall terminate on June 30, 1944 or upon any prior date which the Congress by concurrent resolution, or the President, may designate; except that as to offenses committed, or rights or liabilities incurred prior to such date, the provisions of this section and such rules, regulations, and proclamations shall be treated as remaining in effect for the purpose of sustaining any suit, action, or prosecution with respect to such right, liability, or offense.

Proclamation No. 2413 (5 Fed. Reg. 2467), promulgated by the President on July 2, 1940, pursuant to the Act of July 2, 1940, provides in part:

> Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority vested in me by the said act of Congress, do hereby proclaim that the administration of the provisions of section 6 of that act is vested in the Administrator of Export Control, who shall administer such provisions under such rules and regulations as I shall from time to time prescribe in the interest of national defense.
>
> And I do hereby further proclaim that upon the recommendation of the aforesaid Administrator of Export Control, I have determined that it is necessary in the interest of the national defense that on and after July 5, 1940, the articles and materials hereinafter listed shall not be exported from

the United States except when authorized in each case by a license as hereinafter provided:

* * * * *

2. The following basic materials and products containing the same:

* * * * *

q. Platinum group metals.

* * * * *

And I do hereby empower the Secretary of State to issue licenses authorizing the exportation of any of the said articles and materials the exportation of which is not already subjected to the requirement that a license be obtained from the Secretary of State authorizing their exportation and I do hereby authorize and enjoin him to issue or refuse to issue licenses authorizing the exportation of any of the articles or materials listed above in accordance with the aforesaid rules and regulations or such specific directives as may be, from time to time, communicated to him by the Administrator of Export Control.

* * * * *

The Regulations prescribed by the President on July 2, 1940 (5 Fed. Reg. 2469), governing the exportation of articles and materials designated in the proclamation, prescribe a detailed form of application for license (sec. 2) and provide):

* * * I hereby prescribe the following regulations to govern the exportation of:

* * * * *

q. Platinum Group Metals.

* * * * *

2. None of the articles or materials listed above shall be exported unless a license authorizing such export has been issued by the Secretary of State. * * *

* * * * *

3. The Secretary of State will issue export licenses to authorize proposed shipments of the said articles and materials * * * when I have determined that the proposed exportation would not be detrimental to the the interests of the national defense.

* * * * *

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

An indictment was returned against petitioners and two others, Koppel and Silva, in the United States District Court for the Eastern District of New York charging that they and others named as co-conspirators but not indicted conspired to export platinum without a license in violation of the

Act of July 2, 1940, through the medium of crew members employed on ships and airplanes plying between New York and Portugal (R. 11–20). Koppel pleaded guilty and the trial was severed as to Silva (R. 22). Petitioners were all convicted (R. 1564–1565). Rosenberg, Freier and Friedman were each sentenced to imprisonment for one year and eleven months and to pay a fine of $5,000; Eisler, to imprisonment for 1 year and 4 months and to pay a fine of $1,000; Ferenc and Irene Weisz and Ernest Weiss to imprisonment for 13 months and to pay a fine of $500 (R. 8). On appeal, the judgments were affirmed (R. 1641).

The evidence for the Government may be summarized as follows:

About February 1, 1941, petitioners Rosenberg and Freier met Hersch Neumann, Abe Neumann and Arnold Weisz (the latter three named as co-conspirators but not indicted) in an office at 50 Pine Street in New York City and discussed the possibility of profit by exporting platinum (R. 34, 469). Hersch Neumann sent a cable to Salzberg & Alt, a Lisbon firm with which he had formerly dealt, inquiring about the market for platinum (R. 35, 470). The reply received was satisfactory, and thereafter the Neumann brothers and Rosenberg rented an office at 50 Pine Street (R. 35, 39, 470, 472). Hersch Neumann and Rosenberg made inquiries in New York as to the price of platinum and were informed that

a license was necessary for export purposes. When this was reported to the group, Arnold Weisz stated "You cannot do platinum business with a license." (R. 37–39.) In the course of a discussion of the method of sending the metal to Portugal, Rosenberg stated that Eisler, who had an office in the same building, was acquainted with a captain of a Portuguese steamship, the *Concalho Velho* (R. 40–41, 473). At a later date Rosenberg reported to the Neumanns that he had talked with Eisler and that Eisler thought he could arrange for the transportation of the platinum (R. 42). The Neumanns, Weisz, Koppel, Rosenberg and Freier (referred to hereafter as the group) all decided to participate in the platinum venture (R. 43). Koppel purchased 110 ounces of platinum at $34.75 per ounce and brought it to the Neumann-Rosenberg office (R. 44–45, 784–786). Rosenberg put the package in his pocket and, accompanied by Hersch Neumann, went down to Eisler's office. Neumann waited in the outer room while Rosenberg went inside. When he came out, after talking to Eisler, he no longer had the package of platinum in his pocket. He reported that he had delivered the platinum to Eisler. (R. 45–48, 148–150, 474, 787–788). The next day Rosenberg told the group that he was present when Eisler gave the platinum to the Portuguese officer, and that he had placed $250 in an envelope which was to

be held by one Sunley and given to Eisler when word was received that the platinum had been delivered in Lisbon (R. 48, 476–477, 788). In the presence of the Neumanns, Rosenberg called Sunley to ascertain whether the envelope had been received (R. 49, 476). About April 3, 1941, the Neumanns were informed by cable that the platinum had been received by Salzberg & Alt and the group directed that firm to sell it at about $60 per ounce (R. 49, 477). The proceeds of the sale were received by the Neumanns and divided among the group according to their respective interests (R. 52–54, 478, 487–488).

About April 7, 1941, the group and Irene Weisz, Arnold's sister, had a meeting in the office at 50 Pine Street. Arnold reported that petitioner Friedman had told him there was a 10 percent profit to be made by selling platinum in Canada, and the group decided to try to sell the metal there. (R. 55, 56, 489, 790.) Irene offered to go to Canada but Arnold thought that his brother Ernest, who was an American citizen, would encounter less difficulty (R. 56, 791). Platinum was purchased by Arnold with money contributed by the other members of the group. (R. 57–58.) Irene Weisz and Abe Neumann took a part of this platinum to the home of Ernest Weiss in Brooklyn (R. 61–62, 489, 792), and there another brother, Ferenc Weisz, packed it in a "double bottom" suitcase (R. 490–491). Ernest

took the platinum to Canada but did not sell it there (R. 69, 70, 490–491, 793–794). The platinum was redelivered to the Neumann office by Ferenc (R. 69–70).

About April 15 or 16 Koppel told the group that he had seen a Portuguese ship, the *Pero d'Alenquer,* in the harbor, and that he thought a member of the crew might be persuaded to carry platinum (R. 70, 495, 794). Koppel and Rosenberg went to the ship and met one Silva who agreed to take the platinum to Portugal (R. 795, 797–798). Arrangements were made to bring Silva to the office occupied by Arnold Weisz, which had no name on the door (R. 72–73, 496–497, 798). Irene Weisz was present at the meeting at which Rosenberg reported his arrangement with Silva (R. 72–73, 497). Arnold gave her the keys to his office and she went there with Rosenberg and Abe Neumann, taking part of the platinum with her for delivery to Silva (R. 74, 497). Irene left before Koppel and Silva arrived (R. 497). The platinum was given to Silva with directions as to delivery (R. 498, 798).

Subsequent to the arrangements with Silva, there was a discussion about making similar arrangements with a member of the crew of another Portuguese ship, the *Guine* (R. 79, 505, 801). Irene Weisz, who was present at this meeting, obtained a pass to visit the ship in the name of her brother Ernest (R. 79–80, 505–506, 809).

Koppel took the pass and he and Rosenberg went to the *Guine* (R. 80, 506). They arranged with an officer, Casanovas, to take platinum to Portugal for them (R. 80–81, 506–507, 802–803).

The platinum thus sent was received in Portugal by Salzberg & Alt but was sold in Switzerland because a higher price was obtained there (R. 82–91, 499, 500–501). Freier insured Koppel, Rosenberg and Arnold Weisz against loss of their share in the event the United States entered the war before the platinum was received and sold (R. 95–96, 714).

On May 5, 1941, Hersch Neumann received a telephone call for Rosenberg from a man who gave his name as Eisler. Rosenberg was told about the call when he came in and he then left the office (R. 107–108). Subsequently he reported that Eisler had told him that the *Concalho Velho* was due in New York, and that Eisler wanted $1,000 to arrange for transportation of platinum on that ship (R. 108, 92, 509, 806–807). The others thought this price too high, and subsequently Rosenberg reported that Eisler had agreed to take $600 (R. 92–93, 509–510, 807). Platinum was purchased and given to Rosenberg for delivery to Eisler (R. 93–95, 109, 510, 807). Later the Neumanns were notified by cable that the platinum had been received by Salzberg & Alt (R. 109, 511, 808). This shipment was also sold in Switzerland (R. 112–113, 511). At the

time the money for this shipment was received by the Neumanns, Arnold Weisz had been arrested and the money for Arnold's share was paid to Ferenc (R. 115, 123, 133–134). Freier insured Arnold Weisz against loss of this shipment and the agreement for such insurance was typed by Ferenc (R. 115, 718–719).

About May 14, the group learned that the *Guine* was due to arrive in New York (R. 116, 522). Koppel met Casanovas to arrange for another shipment of platinum, but Casanovas stated that he did not intend to return with his ship (R. 118). Casanovas suggested the name of another officer who agreed to take the platinum. This shipment was received by Salzberg & Alt in Portugal (R. 118–119, 524, 530). Arnold Weisz originally had no part in this last shipment, but he bought out Freier's share before delivery was made (R. 117, 120, 523, 547). Irene Weisz brought to the Neumann office the money by which Arnold purchased Freier's share (R. 121–122, 547). The money on this shipment was never paid to the Neumanns because of government restrictions (R. 141, 524, 530).

In the meantime, in the early part of 1941, Arnold Weisz met one Mezenen who was a flight steward on the clipper flying between the United States and Portugal (R. 967–968). Arnold discussed with Hersch Neumann the possibility of making shipments by air but did not enter into a

transaction with him (R. 169). In the early part of May 1941, Weisz called upon Mezenen at his home and requested him to take some platinum to Portugal. Mezenen was not flying but he arranged to have a co-steward, Mario, take the package. Two shipments were thus carried by Mario for Weisz (R. 970–973). On May 8, 1941, a payment of $8,943 for the account of a Lisbon firm was made to the bank account of Ernest Weiss (Gov. Ex. 37, R. 465). On the stand Ernest stated that the money was Arnold's (R. 1440–1443). On June 4, 1941, Arnold Weisz called Mezenen and asked him to wait in front of his building because Weisz did not want the doorman to see him. Mezenen waited outside as instructed, and the cab passed beyond the building. Weisz stepped out, signaled to Mezenen, returned and took a package from the cab (R. 976–977, 1029–1030, 1058–1059). Weisz and Mezenen went to Mezenen's apartment, the other person remaining in the cab (R. 978, 1030, 1059). Weisz delivered platinum and directions to Mezenen which were found on Mezenen's person upon his arrest the next day (R. 978–983). At the trial, petitioner Friedman admitted on the stand that he was the other person in the cab but stated that he had not known that Weisz was carrying platinum until Weisz told him so on the return journey (R. 1283–1286). Originally, when questioned by F. B. I. agents on June 6,

1941, Friedman denied that he had seen Weisz on the evening of June 4 (R. 1041, 1062–1063). Later, on June 13, after having been identified by the taxi driver as the occupant of the cab with Weisz (R. 1041–1043, 1046), Friedman stated that he had made the trip merely to accompany Weisz, and that on the way there Weisz had told him the package contained platinum (R. 1060, 1062). Friedman admitted that he had written or printed cable messages to be sent to Lisbon by Weisz (R. 1293–1294) and also a cablegram inquiring about sources of platinum in South America (R. 1314–1315). The instructions found with the platinum delivered to Mezenen on June 4 were in Friedman's handwriting (R. 1111, 1113). In April 1941, Friedman's bank accounts showed deposits of over $7,000 (R. 1343).

ARGUMENT

1. Petitioners contend (Pet. I 3, 4, 9–15; Pet. II 8, 9, 13, 15–16)[1] that Section 6 of the Act of July 2, 1940, represented an unconstitutional delegation of legislative power to the President. However, the Act limits the power of the President to the prohibition or curtailment of exports of military equipment, component parts thereof, or supplies necessary for the manufacture or

[1] The petition filed on behalf of Rosenberg, Freier and Eisler is designated as Pet. I; the petition filed on behalf of Friedman and the Weiszes is designated as Pet. II.

maintenance of such equipment, and then only on a finding that national defense so requires. Congress has thus determined the policy and fixed the standards for executive action, leaving only the details of execution to the President. The fact that there is a "zone for the exercise of discretion" by the President does not, as petitioners apparently contend, render the delegation of power invalid, even if judged by the standards applicable to internal legislation. *Bowles* v. *Willingham,* 321 U. S. 503, 513–516; see also *Yakus* v. *United States,* 321 U. S. 414, 423–427; *Hirabayashi* v. *United States,* 320 U. S. 81, 102. *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126; *O'Neal* v. *United States,* 140 F. (2d) 908, 912 (C. C. A. 6), certiorari denied, 322 U. S. 729.

Moreover, as both courts below held (R. 1632–1633, 1641, 1590–1591), the acts here prohibited fall in the field of foreign relations in which a larger degree of discretion may properly be accorded to the President. *United States* v. *Curtiss-Wright Export Corporation,* 299 U. S. 304. The interrelationship between national defense and foreign affairs in July 2, 1940, after the fall of France, is too obvious to need exposition. The Act of July 2, 1940, is directly analogous to the early embargo acts referred to by this Court in the *Curtiss-Wright* decision, *supra,* at pp. 322–326. Significantly, the first of these, the Act of June 4, 1794, 1 Stat. 372, like the present Act, authorized

an embargo whenever in the President's opinion "the public safety shall so require."

2. Petitioners Rosenberg, Freier, and Eisler (Pet. I 3, 4–5, 15–22) attack the regulations issued by the President on the ground that, although they specified that a license was required for the export of certain materials and set forth the form of application for such license, they did not specifically state the conditions upon which a license would be granted. This contention is without substance. As we have shown, *supra,* the statute related to a subject peculiarly within the field of executive discretion. There is nothing to suggest that the congressional grant of power to the President to prohibit or curtail exports except upon the conditions specified in rules and regulations required the President to set up in the rules rigid formulae to cover the many changing factors which would enter into the determination of whether a particular shipment could safely be sent out of the country. A rule prescribing a form of application and reserving power to withhold a license if the statutory standard is not met (*supra,* pp. 5–6) is as much a valid exercise of the rule-making power as a statute conferring such discretion is a valid exercise of the law-making power. Cf. *Lieberman* v. *Van de Carr,* 199 U. S. 552, 560–563, and cases cited, holding that statutes conferring discretion to grant or refuse a license do not violate the due process clause.

3. The contention that the Act of 1940 expired on June 30, 1942 (Pet. I 3, 5, 22–25; Pet. II 8, 9, 13, 16–17), is fully answered in the opinions of the circuit court of appeals (R. 1633–1634) and of the district court (R. 1593–1594). The 1940 Act provided that the authority thereby granted "shall terminate July 30, 1942, unless Congress shall otherwise provide." Congress did "otherwise provide" when by the Act of June 30, 1942, c. 461, 56 Stat. 463, it amended Section 6 to extend the authority thus granted to June 30, 1944. The fact that the later act broadened the power of the President in order to meet war conditions certainly did not indicate that Congress intended to terminate the more limited authority theretofore granted to prepare for war.

4. Petitioners Eisler (Pet. I 4, 5, 29–33), Friedman (Pet. II 8, 9, 18–24) and the three Weiszés (Pet. II 8, 9, 24–32) all challenge the sufficiency of the evidence to support their convictions. The proof as to each is separately summarized in the opinion of the circuit court of appeals (R. 1638–1640). We think that it is clear that these petitioners, although they may not have been the heart of the conspiracy, all gave it their informed and interested cooperation. Contrary to petitioner Eisler's contention (Pet. I 33, the evidence against him does not rest solely on testimony in respect of Rosenberg's reports to the group of his conversations with Eisler. There was evidence

that Rosenberg was seen entering Eisler's office with platinum, was seen talking to Eisler, and that when he left Eisler's office he no longer had the platinum on his person; that subsequently that same platinum was received in Lisbon. This evidence, though circumstantial, clearly constitutes independent proof sufficient to connect Eisler with the conspiracy. As to Friedman, his admitted accompaniment of Arnold Weisz on the visit to Mezenen, his conflicting statements in respect thereof, his assistance to Weisz in the preparation of cables, and his suspiciously large bank deposits (see Statement, *supra,* pp. 13–14), all justify the conclusion that he was an active participant in at least part of Weisz's ventures in platinum. The proof also shows that the three Weiszes were aware of their brother's activities, and that they assisted him and the others by performing various valuable, even if subsidiary, services. In view of the concurrence of two courts below as to the sufficiency of the evidence against all of the petitioners, there is no need for further review by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589–590.

5. Petitioners assert (Pet. I 4, 5, 25–29; Pet. II 8, 9, 13–15, 32–34) that there was a fatal variance between the indictment, which charged one conspiracy, and the proof, which, they contend, established three conspiracies. As the court

below pointed out (R. 1636–1637), the Canadian transaction, which petitioners claim was a separate conspiracy, was closely tied to the shipments by boat to Portugal. The parties were for the most part the same, and the difficulties encountered in Canada led the group to seek out the Portuguese crew members who took some of the later shipments to Lisbon for them. The clipper shipments were, it is true, less closely integrated with the exports by ship. However, the facts that Arnold Weisz was the central figure in all transactions, that he had discussed the possibility of shipments by air with Neumann, a member of the group (R. 169), that the shipments all involved the export of platinum from New York to Lisbon, justified the jury in concluding that the transactions were all parts of an interrelated scheme, even though all the conspirators were not aware of the full extent of the conspiracy and did not participate in it to the same degree. Cf. *United States* v. *Cohen,* 145 F. (2d) 82 (C. C. A. 2), certiorari denied, 323 U. S. 799; *United States* v. *New York Great A. & P. Tea Co.,* 137 F. (2d) 459, 463 (C. C. A. 5), certiorari denied, 320 U. S. 783; *United States* v. *Valenti,* 134 F. (2d) 362 (C. C. A. 2), certiorari denied, 319 U. S. 761; *Martin* v. *United States,* 100 F. (2d) 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649.

In any event, even assuming that two separate conspiracies were proved, the variance was not fatal. The indictment, which mentioned shipments by air (R. 13) and listed the June 4 taxi trip of Friedman and Arnold Weisz as an overt act (R. 20), clearly put the petitioners involved in the clipper transactions on notice that this part of their activities was to be the subject of trial. The evidence as to these later transactions was for the most part presented separately from that relating to the shipments by boat. Petitioners' only claim of prejudice is that the evidence as to the platinum delivered to Mezenen and as to Friedman's bank account may have been the basis for conviction of the others (Pet. I 28–29; Pet. II 32–34). In view of the manner in which the evidence was presented, the jury could not possibly have been confused. Moreover, although the trial judge did not, during the trial, limit the evidence of the clipper transactions to the persons directly connected therewith, he did in his charge separately summarize the factors to be considered in determing the guilt of each defendant (R. 1550–1560), and he mentioned the testimony as to the Weisz-Friedman-Mezenen transactions only in connection with his statement of the evidence as to Friedman (R. 1556-1580). Under the circumstances, assuming that there was a variance, it could not have affected the substantial rights of petitioners and, hence, does not consti-

tute grounds for reversal. *Berger* v. *United States*, 295 U. S. 78, 82.

CONCLUSION

The decision below is correct. It presents no conflict of decisions or questions of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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